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In the Supreme Court of the United States

OCTOBER TERM, 1974

JOHN T. DUNLOP, SECRETARY OF LABOR, AND CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANTS

v.

TURNER ELKHORN MINING CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 1A–13A) is reported at 385 F. Supp. 424.

JURISDICTION

The judgment of the district court (App. B, *infra*, pp. 14A–15A) was entered on November 20, 1974. Appellants' motion to amend the judgment (App. C, *infra*, pp. 16A–17A), filed on December 2, 1974, was denied on December 18, 1974 (App. E, *infra*, pp. 29A–30A). Appellants' notice of appeal to this Court was filed on January 16, 1975 (App. F, *infra*, p. 31A). By order of March 10, 1975, Mr. Justice Stewart ex-

tended the time in which to docket this appeal to and including April 16, 1975. The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether Section 411(c)(3) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 921 (c)(3), which provides for compensation to miners with complicated pneumoconiosis whether or not the miner is functionally disabled, is consistent with the Constitution.

2. Whether Congress, which created in Section 411 (a)(4) of the Act, as amended, 30 U.S.C. (Supp. II) 921(c)(4), a presumption that a miner who has worked 15 or more years in coal mines and who has a totally disabling respiratory or pulmonary impairment is totally disabled due to pneumoconiosis, violated the Constitution by providing that the presumption may be rebutted only by evidence that the miner did not have pneumoconiosis, or that the impairment did not arise out of employment in a coal mine.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

2. Section 411(c) (3) and (4) of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. (Supp. II) 921(c) (3) and (4) provides:

> (c) For purposes of this section—
>
> * * * * *

> (3) if a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be; and
>
> (4) if a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's, his parent's, his brother's, his sister's or his dependent's claim under this title and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. In the case of a living miner,

a wife's affidavit may not be used by itself to establish the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

STATEMENT

Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U.S.C. 901 *et seq.*, provides for the payment of benefits to coal miners suffering from pneumoconiosis. Under Title IV of the Act, coal mine operators are liable for the payment of certain benefits to miners they have employed. 30 U.S.C. 932.

This suit was brought by 22 coal mine operators against the Secretary of Labor and the Secretary of Health, Education, and Welfare seeking injunctive and declaratory relief from the operation of various portions of Title IV. Plaintiffs alleged that the Act violated their rights under the Fifth Amendment.[1]

[1] The complaint also challenged the legality of certain regulations promulgated by the Secretary of Labor pursuant to the Act. The three-judge district court declined to entertain these allegations, and remanded them to the single district judge for disposition. Although the court's pendant jurisdiction would have enabled it to consider these allegations (*Santin Ramos* v. *Civil Service Commission*, 376 F. Supp. 361 (D.P.R.) (three-judge court), appeal on another ground pending, No. 74-216 (relying on *Hagans* v. *Lavine*, 415 U.S. 528)), and although we believe the court should have done so in the interest of efficient judicial administration, we do not contest the remand order.

A. THE STATUTORY PROGRAM

1. The Act deals with the manifold problems of victims of black lung disease, a chronic respiratory ailment caused by the long-term inhalation of coal dust. During the hearings preceding the 1969 Act the Surgeon General estimated that pneumoconiosis affected some 100,000 of the nation's active and inactive coal miners.[2] X-ray examinations have revealed that approximately 10 percent of the nation's active miners, and approximately 20 percent of the inactive miners, suffer from the disease, and even these estimates may understate the scope of the problem.[3] Congress had before it evidence that at least 50,000 cases of black lung disease involved total disability,[4] and data from post mortem examinations indicated an even greater prevalence.[5]

[2] S. Rep. No. 91-411, 91st Cong., 1st Sess., 15; S. Rep. No. 92-743, 92d Cong., 2d Sess., 2.

[3] S. Rep. No. 91-411, 91st Cong., 1st Sess., 7; H. Rep. No. 91-563, 91st Cong., 1st Sess., 5; Hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, on S. 355, Labor: Coal Mine Health and Safety, 91st Cong., 1st Sess., Pt. 2, 729-730 (hereafter cited as 1969 Senate Hearings).

[4] H. Rep. No. 91-563, *supra*, n. 3, at 17-18. House and Senate debates are reprinted, along with the House, Senate and Conference Reports in a Committee Print, Legislative History, Federal Coal Mine Health and Safety Act, House Committee on Education and Labor, 91st Cong., 2d Sess. (hereafter cited as "Leg. His.").

[5] S. Rep. No. 91-411, *supra*, n. 2, at 7 (testimony of Surgeon General).

Pneumoconiosis entails massive fibrosis of the lungs. Although in its earlier stages it does not preclude an individual from engaging in employment, it is progressive once contracted. It eventually severely limits the physical capacity of the miner and, if it does not lead directly to disability or death, it can induce death by cardiac failure and make the individual more susceptible to other causes of death, such as pneumonia.[6] Because black lung is a progressive disease its symptoms may not become visible until long after contraction can be verified by medical means, and until after termination of the employment that caused the disease.[7]

2. Congress found that state workers' compensation laws did not provide adequate coverage for black lung disease, particularly in cases where miners had ceased working before the disease became manifest.[8] In some states the time provided for claiming benefits expired before the symptoms alerted a victim that he had the disease. Other states did not provide coverage for occupational disease. Still others did not provide payments sufficient to compensate the miner.

[6] H. Rep. No. 91-563, *supra*, n. 3, at 13, 15-17; Hearings before the General Subcommittee on Labor, House Committee on Education and Labor, on H.R. 4047, Labor: Coal Mine Health and Safety, 91st Cong., 1st Sess., Pt. 1, 275-276 (hereafter cited as 1969 House Hearings); S. Rep. No. 91-411, *supra*, n. 2, at 7-8, 15; 1969 Senate Hearings, *supra*, n. 3, at Pt. 2, 694-697, 719-720, 857-858, Pt. 4.

[7] 1969 Senate Hearings, *supra*, n. 3, at Pt. 1, 491, 493, Pt. 2, 641, 694-697, 837, 857-858.

[8] 30 U.S.C. 901; H. Rep. No. 91-563, *supra*, n. 3, at 13; Leg. Hist., *supra*, n. 4, at 328.

In order to prevent the occurrence of black lung disease and ameliorate its consequences, Congress included in the Act two basic measures. First, the Act set a limit on the amount of dust that could be present in the ambient air of coal mines.[9] Cf. Section 201(b), 30 U.S.C. 841(b). Second, the Act provides that compensation shall be paid to all coal miners who are "totally disabled" by pneumoconiosis arising out of employment in coal mines, and to the surviving dependents of coal miners whose death was due to the disease. Through a series of definitions, presumptions, and methods of refutation contained in Title IV, the Act provides that any miner suffering from "complicated" pneumoconiosis—the last and terminal stage of the disease—receives this compensation whether or not he is able to engage in alternative work, whereas miners with less-advanced black lung receive compensation only if physically disabled by the disease. Because pneumoconiosis shares many of the attributes of other respiratory and pulmonary diseases, the definition of the disease is cast in generic terms, subject to refutation if a mine operator can demonstrate that the disease is not pneumoconiosis, or that the affected individual could not have acquired such a disease as a result of exposure to dust in the mines.

3. The Act divided the financial responsibility for payment of black lung benefits between the federal government (30 U.S.C. 921 *et seq.*, hereafter Part B)

[9] See Title II of the 1969 Act, 30 U.S.C. 841 *et seq.*, particularly Section 202, 30 U.S.C. 842. See generally H. Rep. No. 91-563, *supra*, n. 3, at 14-20, 40-42; S. Rep. No. 91-411, *supra*, n. 2, at 7-8, 14-21.

and the coal mining industry (30 U.S.C. 931 *et seq.*, hereafter Part C), providing two distinct programs. The federal government assumed in Part B an obligation to pay monthly benefits[10] for life to coal miners disabled by pneumoconiosis, and to surviving dependents of coal miners whose death was due to pneumoconiosis, provided claims were filed on or before December 31, 1971. The 1972 amendments extended this cutoff date to June 30, 1973,[11] and provided a "transitional" six-month federal liability for claims filed between July 1 and December 31, 1973.[12] Claims filed after July 1, 1973, are the responsibility of employers, who are required to make payments commencing January 1, 1974.[13] The current provisions of Part C provide that employer liability for these payments will last until 1981.[14] Because of the three-

[10] The amount of the benefits was established at 50 percent of the minimum monthly payment to which a totally disabled federal employee in grade GS–2 would be entitled under the Federal Employees Compensation Act (*i.e.*, $136.25 per month), 5 U.S.C. (1964 ed., Supp. V) 8112, with certain increases for up to three dependents. Section 412(a), 30 U.S.C. 922(a).

[11] Section 414(a)(1), (b), 30 U.S.C. (Supp. II) 924(a)(1), (b).

[12] Section 415, 30 U.S.C. (Supp. II) 925.

[13] Sections 421, 422, 30 U.S.C. (Supp. II) 931, 932. The 5 U.S.C. (1964 ed., Supp. V) 8112, with certain increases for substituting employer responsibility for federal responsibility was needed to give the states additional time to enact appropriate changes in their workmen's compensation laws to provide adequate coverage for pneumoconiosis. S. Rep. No. 92–743, *supra*, n. 2, at 20.

[14] Section 422(e)(3), 30 U.S.C. (Supp. II) 932(e)(3).

year statute of limitations contained in the Act, employers are responsible only for pneumoconiosis discovered after the initial passage of the Act in 1969. Section 422(f)(1), 30 U.S.C. (Supp. II) 932 (f)(1).[15]

4. An association of mine operators brought a suit challenging substantially all of the provisions of the Act and the Secretary of Labor's implementing regulations. The complaint alleged that the Act was a taking of property without just compensation, was a retroactive impairment of contracts, and deprived the mine operators of due process of law. A three-judge district court in the District of Columbia upheld most of the provisions of the Act, and this Court summarily affirmed. *National Independent Coal Operator's Association* v. *Brennan,* 372 F. Supp. 16 (D.D.C.), affirmed, October 29, 1974, No. 73–1902. Faced with a direct assault on the constitutionality of Title IV, the district court there held: "Congress had the constitutional power to enact Title IV of the Act." 372 F. Supp. at 23. Appellants' Jurisdictional Statement in No. 73–1902 contended that the presumptions and limitations on rebuttal evidence contained in Title IV are unconstitutional (J.S. 13–15), and this Court rejected that contention in its summary affirmance.[16]

[15] But see Section 415, 30 U.S.C. (Supp. II) 925, containing an exception for the six-month transitional period.

[16] Plaintiffs in the instant case have been provided copies of the Jurisdictional Statement and the government's Motion to Affirm in No. 73–1902, and the district court also had been furnished copies.

B. THE DISTRICT COURT'S DECISION

In this case a three-judge district court was convened pursuant to 28 U.S.C. 2282 and 2284. The court deferred consideration of the case until this Court had acted in *National Independent Coal Operator's, supra.* Then, upon cross-motions for summary judgment, the district court upheld most of the challenged statutory provisions,[11] but ruled that "the irrebuttable presumption set forth in 30 U.S.C. 921(c)(3) and the limitation of evidence necessary to rebut the presumption created in 30 U.S.C. 921(c)(4) are violative of the United States Constitution" (App. B, *infra,* pp. 14A–15A).

The two provisions struck down by the district court contain important definitions and presumptions.

1. Section 411(c)(3) of the Act provides that "if a miner is suffering or suffered from a chronic dust disease of the lung," shown by x-rays, by a biopsy, or by similar techniques to be characterized by massive lesions of the lung, "then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis * * *." The district court concluded that this section "not only involves a presumption of the existence of pneumoconiosis but forecloses all fact finding as to the effect of that disease upon a particular coal miner upon a clinical finding of the presence of a chronic dust disease" and "is a departure from the overall pattern of the Act which makes the existence of both the disease and disability two (2) separate factors which must be established before liability is imposed" (App. A, *infra,* p. 9A). The court held (App. A, *infra,* p. 10A):

> To the extent that such presumption purports to mak[e] a finding of total disability in terms other than those provided by the Act as standards for total disability, it is unreasonable and arbitrary. As written, section 921(c)(3) is violative of due process in precluding the opportunity to present evidence as to the effect of a chronic dust disease upon an individual in determining whether or not he is disabled.

2. Section 411(c)(4) of the Act, 30 U.S.C. (Supp. II) 921(c)(4), provides that if a miner employed for more than 15 years in underground coal mines is unable to submit evidence satisfactory under Section 411(c)(3), but "other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment," then a rebuttable presumption arises that the disability is caused by pneumoconiosis. This presumption may be rebutted only by evidence that the miner did not have pneumoconiosis, or that his "impairment did not arise out of, or in connection with, employment in a coal mine."

The district court sustained the constitutionality of the presumption that respiratory impairments of long-time miners are pneumoconiosis, but held that the limitation upon the evidence that can be used to

[11] The plaintiffs have filed a notice of appeal from that portion of the judgment sustaining provisions of the Act. We believe that this Court already has decided the issues raised in plaintiffs' cross-appeal. See *National Independent Coal Operator's Association* v. *Brennan*, No. 73-1902, decided October 29, 1974, affirming 372 F. Supp. 16 (D.D.C.).

rebut the presumption is "invalid as arbitrary and unreasonable" (App. A, *infra,* p. 11A). The court concluded that because pneumoconiosis is not disabling *per se,* "[t]o require rebuttal evidence that a coal miner did not have pneumoconiosis is irrational where liability is not predicated on the mere presence of the disease, but rather on a complicated state of the disease"[18] (*ibid.*). The court went on: "There is no rational basis upon which the burden of proving that the impairment 'did not arise out of, or in connection with employment in a coal mine' can be placed upon a specific potentially liable coal mine operator" (App. A, *infra,* p. 12A; footnote omitted).

The government's motion to amend the judgment was denied (App. E, *infra,* pp. 29A–30A). The government's motion for a stay pending appeal (App. D, *infra,* pp. 18A–28A) also was denied (App. G, *infra,* pp. 32A–35A).

THE QUESTIONS ARE SUBSTANTIAL

The district court has invalidated on constitutional grounds two significant provisions of Title IV of the Act. As a result, certain miners afflicted with an irreversible and fatal disease would be denied the benefits Congress intended them to have.

1. In Title IV of the Act Congress declared that benefits should be paid to miners who have been disabled by pneumoconiosis. Section 411(c)(3) of the Act provides that miners who have been diagnosed

[18] The district court inaccurately characterized the scope of Section 411(c)(4), which, unlike Section 411(c)(3), is not restricted to "a complicated state of the disease."

as having complicated pneumoconiosis are "irrebuttably presumed" to be totally disabled due to pneumoconiosis, or (if deceased) to have died because of pneumoconiosis.[19]

a. The rule contained in Section 411(c)(3) is supported by testimony before Congress that complicated pneumoconiosis is an irreversible and fatal stage of coal workers' pneumoconiosis.[20] On the basis of that testimony, Congress was entitled to conclude that all such afflicted miners should be classified as "disabled" for compensation purposes. The legislative history

[19] "For purposes of this subsection, any individual who suffers from complicated pneumoconiosis shall be deemed to be totally disabled." H. Conf. Rep. No. 91-761, Leg. Hist., *supra,* n. 4, at 1064.

[20] Dr. William H. Stewart, former Surgeon General of the United States, stated:

"In its advanced form, it [pneumoconiosis] leads to severe disability and premature death."

1969 Senate Hearings, *supra,* n. 3, at 719.

Similarly, Dr. Leon Cander, Chairman of the Department of Medicine of the University of Texas Medical School, an acknowledged expert in pulmonary medicine, testified:

"Once progressive massive fibrosis develops there is no way to prevent its relentless progress. If you remove the miner from the mine, it does not matter; the disease progresses.

* * * * *

"Patients with progressive massive fibrosis, however, usually die of either pulmonary insufficiency or heart failure caused by pulmonary disease." *Id.* at 858.

As Congressman Dent noted, "when the victim reaches the fourth stage, known as progressive massive fibrosis or complicated pneumoconiosis * * * he has a fatal, uncurable and irreversible disease. At that time he is destined to die from the disease." Leg. Hist., *supra,* n. 4, at 693.

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demonstrates that Congress intended to compensate all miners who suffered from the terminal disease of complicated pneumoconiosis, including the few miners who retained some ability to work. Although complicated pneumoconiosis "usually produces marked pulmonary impairment and considerable respiratory disability,"[21] Congress was aware that there are "patients with progressive massive fibrosis with mild pulmonary function changes and little or no disability."[22] In enacting 411(c)(3), Congress made the legislative judgment that a miner whose lungs had been largely destroyed by massive lesions caused by black lung disease, and who therefore was incurably ill, should be compensated even before the disease had so progressed that he was completely unable to work.

This case therefore involves a straightforward legislative judgment defining who is to be compensated. It does not, as the district court believed, present an unconstitutionally expansive "presumption," or an unjustifiable limitation upon the right of a litigant to introduce relevant evidence.

b. Congress possesses the power to decide that miners suffering from the terminal condition described in Section 411(c)(3) of the Act should be compensated. Section 4 of the Act, 30 U.S.C. 803, provides that the Act applies to "[e]ach coal mine, the products of which enter commerce or * * * affect commerce * * *."

[21] H. Rep. No. 91-563, *supra*, n. 3, at 13.

[22] 1969 Senate Hearings, *supra*, n. 3, at 858.

This Court repeatedly has upheld Congress' power, under the Commerce Clause, to regulate working conditions provided by private employers and the compensation of their employees laboring in industries affecting commerce, even though the particular activities Congress regulates are not "in" interstate commerce. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. 294, 303–304 (restaurant service); *United States* v. *Darby*, 312 U.S. 100 (Fair Labor Standards Act); *Southern Ry. Co.* v. *United States*, 222 U.S. 20 (Safety Appliance Act may constitutionally be applied to intrastate train movements). Congress similarly possesses the power to prescribe schedules of benefits to be paid to miners who incur occupational diseases because of employment in an industry affecting commerce.

Compensation schemes of the sort established by Title IV often are termed "schedule benefits," and they are embodied in most state workmen's compensation laws, as well as the Longshoremen's and Harbor Workers' Compensation Act.[23] Under such laws specified benefits are payable for certain employment-related injuries without regard to the affected employee's total or partial disability for work, or loss of wages, or wage earning capacity.[24]

This Court has upheld the constitutionality of workmen's compensation provisions that provide benefits based upon a medical condition rather than current inability to work. *New York Central R.R. Co.* v.

[23] 33 U.S.C. 908(c).

[24] 2A Larson, *The Law of Workmen's Compensation*, § 58.19, *et seq.* (1975).

Bianc, 250 U.S. 596, sustained a New York statute conferring benefits upon employees who suffered an employment-related facial disfigurement but no loss of ability to work. See also *Arizona Employers' Liability Cases,* 250 U.S. 400, 433 (opinion of the Court; Holmes, J., concurring). In *Urie* v. *Thompson,* 337 U.S. 163, 181–187, the Court held that occupational diseases were compensable as "injuries" under the Federal Employer's Liability Act, whenever the disease "impairs or destroys an employee's health" (id. at 186). The court intimated no doubt about the constitutionality of compensation for such impairments. *A fortiori,* Congress has the power to direct that miners be compensated for a reduction of their life spans because of complicated pneumoconiosis arising out of their employment in coal mines.

c. Nevertheless, the district court held that Section 411(c)(3) is unconstitutional because it erects an "irrebuttable presumption" of disability, whether or not a miner is actually disabled by complicated pneumoconiosis. The district court's characterization of the section is inaccurate. Although Section 411(c)(3) uses the words "irrebuttably presumed," it does not create a presumption within the meaning of the irrebuttable presumption cases. Cf. *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, 644–646. Congress has simply used a form of legislative shorthand to indicate that all miners with complicated pneumoconiosis, a terminal and irreversible disease, are to be compensated whether or not they are still able to work.

Section 411(c)(3) provides that all miners afflicted with complicated pneumoconiosis shall be treated as if they were totally disabled, as that term is used elsewhere in the statute. It does not presume, irrebuttably or otherwise, that these miners are presently unable to work, and that because of this hypothetical disability they should receive certain treatment.[25] In other words, Section 411(c)(3) is not a legislative decision that, contrary to fact, all miners afflicted with complicated pneumoconiosis are totally disabled physically. It expresses instead a legislative judgment that all miners with complicated pneumoconiosis should receive compensation. In the context of the Act, denominating all such miners "totally disabled" produces that result.[26]

It is not material to the Act's constitutionality that Congress chose to use this shorthand method of expression. Congress, as we have shown, has the power under the Constitution to provide that all miners suffering from complicated pneumoconiosis shall be compensated whether or not currently disabled, and the validity of the exercise of this power does not turn on the form of expression Congress used to accomplish this result.

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[25] If it created such a presumption it would have to be analyzed, as the irrebuttable presumption cases have done, to determine whether the presumption is rational or whether it is overbroad or oppressive. Cf. Note, *The Irrebuttable Presumption Doctrine in the Supreme Court,* 87 Harv. L. Rev. 1534 (1974).

[26] Indeed, under the Act's definition section, 30 U.S.C. (Supp. II) 902(f), "total disability" is a statutory term of art which is not synonymous with total inability to work. See 20 C.F.R. 410.412(a)(2).

2. Section 411(c)(4) of the Act provides that a miner employed for 15 years or more in a coal mine, but unable to qualify for benefits under the rule of Section 411(c)(3), is rebuttably presumed to be (or, if deceased, to have been) totally disabled because of pneumoconiosis, if he can present evidence of a totally disabling respiratory or pulmonary impairment.[27] Unlike Section 411(c)(3), which creates a rule of substantive law, this section creates an evidentiary presumption in cases where a miner cannot demonstrate that his pneumoconiosis has reached the progressive or complicated stage. The miner (or the Secretary in his stead) must prove lengthy employment, the presence of a respiratory disease, and total disability. A presumption then arises that the disease is pneumoconiosis. The section then provides that this presumption can be rebutted "only" by evidence that the miner did not have pneumoconiosis or that the impairment did not arise out of employment in a coal mine.[28]

The district court held this provision arbitrary and unreasonable because it forecloses evidence that would refute total disability. This holding is based upon a misreading of Section 411(c)(4). Because the claimant must establish total disability before the presump-

[27] This provision was added in 1972, in part to make it clear that benefits should not be denied solely on the basis of a negative x-ray. S. Rep. No. 92-743, *supra*, n. 2, at 12-13. Congress was specifically aware that a miner could be totally disabled from pneumoconiosis even though the disease did not appear in x-rays. *Id.* at 8-12.

[28] Although this provision, by its terms, applies to the Secretary of Health, Education and Welfare, it also applies to coal operators by virtue of 30 U.S.C. (Supp. II) 925 and 932.

tion of pneumoconiosis arises, the "only" clause does not operate until all evidence relevant to disability has been received. The section does not preclude a mine operator from demonstrating that the claimant is not disabled. Proof of total disability is a condition precedent to the operation of the rebuttable presumption, and the government has so construed it.[29] The district court's constitutional conclusion must fall once its statutory misapprehension is corrected.[30]

3. For the reasons we have discussed above, the district court's invalidation on constitutional grounds of these federal statutory provisions was incorrect. Moreover, the court should not have reached this decision after this Court's summary affirmance in *National Independent Coal Operator's, supra.* The complaint in that case had challenged on constitutional grounds all of the black lung benefits provisions of the Act, and had asserted the ground upon which the court below acted—that the "presumptions" of Title IV transgressed the Constitution because there is "no

[29] The regulations implementing the Act provide that unless a miner must establish "total disability" either by the irrebutable presumption contained in Section 411(c)(3) or by other sufficient factual showing. 20 C.F.R. 410.412, 410.422-410.426; 20 C.F.R. Part 718

[30] The district court also concluded that Section 411(c)(4) is irrational because it places upon a specific coal mine owner the burden of proving that the respiratory or pulmonary disease arose out of coal mine employment. But the Section imposes no such burden. It provides only the manner in which the presumption contained in Section 411(c)(4) can be rebutted. The operator also can defeat liability by proving that the disability did not arise, at least in part, out of employment in his mines. 30 U.S.C. 932(c).

rational connection in common experience between the fact proved and the ultimate fact presumed" (J.S. 15). The district court rejected these contentions and broadly upheld Title IV. Appellants in that case raised the contentions again in their Jurisdictional Statement, although they did not specifically challenge the rule of Section 411(c)(3). The government's Motion to Affirm (at pp. 12–13) specifically addressed the rebuttable presumption of Section 411(c)(4), and this Court affirmed.

If this Court's affirmance decided all issues raised in the complaint and covered by the district court's judgment [31] (see *Fusari* v. *Steinberg*, No. 73–848, decided January 14, 1975, slip op. 2 (Burger, C.J., concurring)), then it already has decided all the issues of this case adversely to plaintiffs here.[32] If, however, the summary affirmance reached only the issues specifically joined in the Jurisdictional Statement and the Motion to Affirm, then it has not yet passed upon the constitutionality of the rule in Section 411(c)(3).

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted. In light of the importance of this case to the beneficiaries, the precedents governing the

[31] The district court's formal judgment in *National Independent Coal Operator's* simply granted summary judgment for the government in all particulars. It therefore held against plaintiffs on all of the allegations raised in their complaint.

[32] Of course, the Court has not passed upon the constitutionality of Section 411(c)(4) as *mis*construed below, for neither plaintiffs in No. 73–1902 nor the District Court for the District of Columbia shared that misconception.

constitutional issues presented, and the summary affirmance earlier this Term in *National Independent Coal Operator's*, the Court may wish to consider summary reversal.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

FRANK H. EASTERBROOK,
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APRIL 1975.

570-762—75——4

APPENDIX A

In the United States District Court for the Eastern District of Kentucky
Pikeville
Civil Action No. 1761
(Filed, Nov. 19, 1974, at Frankfort, Davis T. McGarvey, Clerk, U.S. District Court)

TURNER ELKHORN MINING COMPANY, A KENTUCKY CORPORATION, ET AL., PLAINTIFFS

v.

PETER J. BRENNAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, AN AGENCY OF THE FEDERAL GOVERNMENT, AND CASPER W. WEINBERGER, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AN AGENCY OF THE FEDERAL GOVERNMENT, DEFENDANTS

MEMORANDUM OPINION

Before LIVELY, *Circuit Judge*, and MOYNAHAN and HERMANSDORFER, *District Judges*.

This action constitutes a facial attack upon the constitutionality of portions of Subchapter IV, Black Lung Benefits, of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. 91–173, Dec. 30, 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, Pub. L. 93–303, May 19, 1972, 86 Stat. 925, 30 U.S.C. 901 *et seq.* Plaintiffs are twenty-two (22) coal mine operators who charge the Act violates rights secured under the Fifth Amendment to the Federal Constitution. The defendants are the Secretaries of the United States Departments of Labor and Health, Education and Welfare.

Jurisdiction is invoked and found under 28 U.S.C. 2282. Such jurisdiction is limited to a consideration of the Act and does not extend to a consideration of administrative regulations, *William Jameson & Co.* v. *Morgenthau,* 307 U.S. 171 (1939); *Sardino* v. *Federal Reserve Bank of New York,* 361 F. 2d 106 (1966), cert. denied 385 U.S. 898 (1966), which are within the jurisdiction of a single judge court. Further, we consider only the facial attack made upon portions of the Act and not its implementation to any specific claim for benefits.

Perspective may be had in considering the questions presented by first noticing the general legislative plan incorporated in the Federal Coal Mine Health and Safety Act as amended. The Act is structured in terms of a preamble and five (5) major subchapters, each of which is devoted to a separate legislative concern. Our present efforts are concerned only with portions of Subchapter IV. This subchapter, denominated "Black Lung Benefits", is comprised of three (3) primary subdivisions entitled respectively "Part A—General Provisions"; "Part B—Claims for Benefits Filed On Or Before December 31, 1972"; and, "Part C—Claims for Benefits After December 31, 1972". Of these subdivisions our attention is directed to Parts B and C only.

Part B of Subchapter IV deals principally with benefits for total disability or death arising from pneumoconiosis which are to be determined and paid by the Federal Government. Eligibility and standards for processing claims are provided by sections 921 through 924. The final section in Part B, section 925, establishes a transition period, June 30, 1973 to December 31, 1973, during which federal participation as payee of benefits is phased out and state administration of liability through workmen's compensation

coverage with federally approved standards, 30 U.S.C. 931, or direct liability on coal mine operators, 30 U.S.C. 932, is assumed.

Part C directly deals with conditions under which the Secretary of Labor will certify state workmen's compensation laws as complying with federal standards, or, if such compliance is not found, imposition of liability on the coal mine operators. In the circumstance of direct liability upon a coal mine operator, the Act specifically recognizes the requirement of an employment nexus between the coal miner or those claiming in respect of a deceased coal miner and the particular coal mine operator against whom the claim is made. Pursuant to Part C, section 932(a), liability devolves to such operator "with respect to death or total disability due to pneumoconiosis *arising out of employment in such coal mine*"; and, under section 932(*c*), it is provided that there is *no liability* on such operator for benefits "*due to pneumoconiosis which did not arise, at least in part, out of employment in such mine during the period when it was operated by such operator*".[1] (Emphasis added)

Further, claims must be filed within the limitations period established by the Act. Under Part B a claim must be filed generally by December 31, 1973; the exceptions may result in an extension of six (6) months from December 31, 1973 under sections 922 (a)(3), 924. Part C requires the claim to be filed within three (3) years of the discovery of total disability or of death from pneumoconiosis, section 931 (b)(2)(D), except in the case of a living miner whose

[1] This may include liability from a prior operator's business if such prior operator operated the coal mine on or after December 30, 1969, the effective date of the Act. The prior operator is not, however, relieved of liability by this provision. 30 U.S.C. 932(i)(2).

eligibility is established under section 921(c)(4) where the claim of miners engaged in coal mining for more than fifteen (15) years must be filed within three (3) years of the last exposure to disease employment, or in the event of death, within fifteen (15) years of the last exposure employment. 30 U.S.C. 932(f)(1)(2).

Argument is made that the statutory scheme outlined for assessing liability on the coal mine operator for those miners no longer in the work force is irrational and amounts to reparations in favor of the coal miners against the coal industry. The rational approach, argue plaintiffs, is the workmen's compensation approach where the risk of injury or disease is insured against during the employee's period of employment and the economic burden thereby incurred is spread to the public through the pricing mechanism. To impose what plaintiffs believe will be a severe economic burden on the coal industry for total disability or death arising from periods of employment of miners when the disease has not been recognized [2] and no methods of protecting the industry from that risk were taken, is argued as constitutionally impermissible. Plaintiffs cite a multi-issue railroad pension case, *Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935), which held that a requirement for interstate carriers to pay a retirement allowance to persons who were in the service within one (1) year of the Act was arbitrary and unreasonable. Mr. Chief Justice Hughes and those justices joining him in dissent did, in fact, concur in the majority's holding on that particular question. 295 U.S. 389. We hold, however,

[2] There was testimony and information, eg. Senator Javits, to the effect that pneumoconiosis was not recognized in the United States until the mid-1950's. *1969 Legislative History 33.*

that the *Alton* decision is distinguishable. There, any person who was employed within one (1) year of the date of the Act was to be awarded benefits even though such person may have been discharged for cause or severed employment for a reason incompatible with the imposition of implied *quasi-contract* responsibility to pay such allowance for retirement. The Court in *Alton* recognized a fundamental difference between compensation type laws which deal with existing rights and liabilities and the Act there under consideration which sought to impose "a new incident, without reference to any existing obligation or legal liability", upon the employer-employee relationships. 295 U.S. at 369–71. In the instant case the Act imposes liability upon a coal operator only if standards sounding in tort are met: (1) a claim is timely filed; (2) a prior employment nexus is established; (3) the claim is based on pneumoconiosis arising, at least in part, from such employment; and (4) the coal miner has become totally disabled or has died from pneumoconiosis. Those factors not only distinguish *Alton, supra,* but manifest a logical and rational basis for the assertion of liability.

In assessing the argument against imposition of remote claims where the responsible party did not insure against that particular risk because it was unknown to the coal industry at large, we are not persuaded that fact makes the Act unreasonable. Clearly, plaintiffs have cited no binding or persuasive authority showing that such liability for remote claims violates safeguards of the Federal Constitution. This Court may not, under *U.S.* v. *Carolene Products Co.*, 304 U.S. 144, 145 (1938), superimpose its judgment on that of Congress:

> * * * where the legislative judgment is drawn into question, [judicial inquiry] must be restricted to the issue whether any state of

> facts either known or which could reasonably be assumed affords support for it. * * * As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it.

We find that the manner in which liability is assessed is rational, and the decision of Congress to impose it on what may be called remote claims of those former miners no longer in the work force was an exercise of its lawful power under the Constitution.

The statutory manner of imposing and implementing such liability as the Act imposes upon coal mine operators under the Act presents a separate and distinct issue of several parts.

First, the Act identifies a particular disease which, when manifest in an advanced state in coal miners, may cause total disability or death. There is no doubt that the Congress elected to avoid precise medical terminology in defining pneumoconiosis, section 902(b):

> The term "pneumoconiosis" means a chronic dust disease of the lung arising out of employment in a coal mine.

No meaningful argument has been presented challenging the power of Congress to make such definition after receiving conflicting medical evidence about the disease.[3] The naming of the disease or its components in this instance is of more academic than legal significance. *U.S.* v. *Carolene Products Co., supra.* We hold the definition is neither arbitrary nor unreasonable.

Second, under part B of the Act at section 921(c)

[3] The committee reports abound with such conflict. A summary is presented in *U.S. Code, Cong. and Admin. News,* 92d Cong., Second Session, 1972, p. 2315.

there are four (4) statutory presumptions made in aid of a claimant's efforts to secure benefits. Plaintiffs have standing to attack these presumptions under section 925 where the Secretary's findings of liability during the transition are binding on the operators and, as to the last presumption, under section 932(f)(2), where it is specifically incorporated into Part C as a basis for benefit eligibility. The provisions of section 921(c) are:

> For the purposes of this section—
>
> (1) if a miner who is suffering or suffers from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment;
>
> (2) if a deceased miner was employed for ten years or more in one or more coal mines and died from a respiratory disease there shall be a rebuttable presumption that his death was due to pneumoconiosis;
>
> (3) if a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by either means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be; and
>
> (4) if a miner was employed for fifteen years or more in one or more underground coal mines,

> and if there is a chest roentgenogram submitted in connection with such miner's * * * claim under this title, and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, or that at the time of this death he was totally disabled by pneumoconiosis. * * * The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

Plaintiffs make the argument that the presumptions presented by statute are irrational and amount to de facto irrebuttable presumptions. In *Tot* v. *United States*, 319 U.S. 463 (1943), the Court, relying upon its decision in Mobile, *J. & K. C. R. Co.* v. *Turnipseed*, 219 U.S. 35 (1910), held that the controlling test for determining the validity of a statutory presumption was "that there be a rational connection between the facts proved and the facts presumed". 319 U.S. at 467. The Court wrote:

> Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed. See *Leary* v. *United States*, 395 U.S. 6, 33 (1969).

The function of a rebuttable presumption is simply to shift the burden of proof. We do not doubt that Congress has the power to make such presumptions.

In the medical testimony received by the Congress there was no significant disparity as to the fact that exposure in a coal mine for a period of ten (10) years

would typically present a medically identifiable case of advanced or complicated pneumoconiosis. Thus, a rebuttable presumption that after ten (10) years, as established in presumptions (1) and (2) of section 921(c), a coal miner has pneumoconiosis arising from his employment may be sustained; provided, that in the case of a coal miner with multiple employer experience of a period of ten (10) or more years, the presumption is not used as a basis for identifying one of such employers as being responsible under the Act. Such a determination involves fact questions which were not, or hardly could be, established before the Congress. Curiously, Congress did not legislate directly upon this critical selection process or establish standards for rule making, but rather, delegated the entire problem to the Secretary of Labor. 30 U.S.C. 932(h). There is no dispute that Congress has the power to make such a delegation. Accordingly, that delegation can only be deemed proper.

The irrebuttable presumption contained in section 921(c)(3) not only involves a presumption of the existence of pneumoconiosis but forecloses all fact finding as to the effect of that disease upon a particular coal miner upon a clinical finding of the presence of a chronic dust disease of the lung of a coal miner. The pattern adopted in section 921(c)(3) is a departure from the overall pattern of the Act which makes the existence of both the disease and disability two (2) separate factors which must be established before liability is imposed. The statutory definition of total disability involves factual issues distinct from clinical findings. 30 U.S.C. 902(f):

> The term "total disability" has the meaning given it by the regulation of the Secretary of Health, Education and Welfare, except that such regulation shall provide that a miner shall

> be considered totally disabled *when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time.* Such regulation shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act. (Emphasis supplied)

To the extent that such presumption purports to making a finding of total disability in terms other than those provided by the Act as standards for total disability, it is unreasonable and arbitrary. As written, section 921(c)(3) is violative of due process in precluding the opportunity to present evidence as to the effect of a chronic dust disease upon an individual in determining whether or not he is disabled. *Heiner* v. *Donnan*, 285 U.S. 312, 329 (1932); *Stanley* v. *Illinois*, 405 U.S. 645 (1973); *Vlandis* v. *Kline*, 412 U.S. 441 (1973).

The final rebuttable presumption provided by section 921(c)(4) differs from all other statutory presumptions of section 921(c) in that it provides the standard "and, if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment", then the employment experience of fifteen (15) years together with such other evidence may be used to support a rebuttable presumption. In this construction "other evidence" of total disability would by traditional rules of statutory construction imply evidence of total disability within the meaning of the Act as opposed to a finding of total disability in every case solely upon clinical evidence of a chronic dust disease. Given this construction the presumption contained in section 921 (c)(4) passes constitutional muster. This presumption merely makes certain that a negative x-ray does not become conclusive evidence that there is no mine-related disability arising from pneumoconiosis.

Third, within the language of section 921(c)(4), but outside the enactment of the presumption itself, is the following:

> The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

We declare this limitation upon evidence to rebut the presumption that such disability is due to pneumoconiosis established by section 921(c)(4) to be invalid as arbitrary and unreasonable. Congress has made no finding that pneumoconiosis *per se* is disabling. Quite to the contrary, Congress has recognized that the disease must produce total disability or death before any operator may be held liable for benefits. 30 U.S.C. 932. It has been judicially determined that pneumoconiosis, like any other disease, is not disabling per se. Cf. *Rose* v. *Cohen*, 406 F. 2d 753 (6th Cir. 1969); *Hall* v. *Weinberger*, No. 1375 (E.D. Ky. 1973), *aff'd mem.* No. 73-1871 (6th Cir. 1974). Since, under section 925, the operator is bound by the Secretary's finding of liability under Part B, the operator may attack the application of this limitation. To require rebuttal evidence that a coal miner did not have pneumoconiosis is irrational where liability is not predicated on the mere presence of the disease, but rather on a complicated state of the disease.

Further, the liability established under section 932 (c) specifically exonerates a coal operator of liability for benefits "which did not arise, at least in part, out of employment in such mine during the period when

it was operated by such operator". There is no rational basis upon which the burden of proving that the impairment "did not arise out of, or in connection with employment in a coal mine"[4] can be placed upon a specific potentially liable coal mine operator. Such operator must be found liable under the Act for his mine's involvement in the disease, if any.

Fourth, no basis is shown, and we can find none, upon which Congress may deprive a litigant of the right to produce whatever evidence may be admissible generally in attempting to rebut a presumption without offending due process.

We are persuaded that none of our holdings in this matter affect the facial constitutionality of the Act *per se.* Excising those matters found to be constitutionally offensive, we hold that the Act is left substantially unimpaired, and no essential part of the legislative plan has been attacked successfully.[5] The

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[4] It has been suggested that as section 932(c) provides that no benefit is payable by any operator for death or total disability which did not arise, at least in part, out of employment in a mine during the period when it was operated by such an operator, then the presumption dealt with in section 921(c)(4) could be construed, when applied to an operator's liability under Part C, to mean "employment in *its* coal mine" rather than "employment in *a* coal mine" as written. It is questionable whether this Court has the authority to so construe the plain language of an Act of Congress and, in this instance, declines to entertain the suggestion.

[5] We note that a similar but in part distinguishable case involving the Act and regulations is *National Independent Coal Operator's Association* v. *Brennan,* 372 F.Supp. 16 (D. D.C. 1974), affirmed without opinion, ——U.S.——, No. 73-1902, October 29, 1974. The opinion of the District of Columbia Court does not touch directly the matters found constitutionally objectionable in the instant case. The closest point of convergence is found in the *Brennan* decision's Conclusions of Law (v), 372 F.Supp. at 24:

"Pursuant to Sections 422(h) and 422(f)(2) of the Act, the Secretary of Labor properly promulgated regulations applying the Section 411 presumptions to Section 422 operator liability. Therefore, the *statutory provisions pursuant to which the Secretary's regulations were promulgated* do not and will not deprive the plaintiffs in No. 1711-73 of their property without due process of law or deny them equal protection of the law." (Emphasis added.)

This conclusion holds that sections 422(h) and (f)(2) are valid. It does not consider the validity of section 411(c) of the Act. Our consideration of these issues, therefore, is not precluded nor are the issues mooted by the decision of the Supreme Court.

Secretary shall no longer seek to apply the irrebuttable presumption made by section 921(c)(3) or to limit evidence in rebuttal to the presumption created in section 921(c)(4). All other provisions of the Act which have been considered are hereby declared to be permissible legislation under the Federal Constitution.

All matters raised in the pleadings which are outside the jurisdiction of this Court are retained for consideration by the requesting judge.

An order in conformity with this Memorandum Opinion shall be entered forthwith.

This the 19 day of November, 1974.

Entered by direction of the Court:

H. DAVID HERMANSDORFER,
Judge.

A true copy attest:

DAVIS T. MCGARVEY,
Clerk, U.S. District Court.
DOROTHY B. WOOD,
Deputy Clerk.

APPENDIX B

In the United States District Court for the Eastern District of Kentucky

Pikeville

Civil Action No. 1761

(Filed, Nov. 19, 1974, at Frankfort, Davis T. McGarvey, Clerk, U.S. District Court)

TURNER ELKHORN MINING COMPANY, A KENTUCKY CORPORATION, ET AL, PLAINTIFFS

v.

PETER J. BRENNAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, AN AGENCY OF THE FEDERAL GOVERNMENT, AND CASPER W. WEINBERGER, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AN AGENCY OF THE FEDERAL GOVERNMENT, DEFENDANTS

Notice is hereby given of the entry of this order or judgment on November 20, 1974, Davis T. McGarvey, *Clerk;* Dorothy B. Wood, *Deputy Clerk*

ORDER

In conformity with the Memorandum Opinion this date entered herein,

IT IS ORDERED AND ADJUDGED HEREIN AS FOLLOWS:

(1) That the irrebuttable presumption set forth in 30 U.S.C. 921(c)(3) and the limitation of evidence

necessary to rebut the presumption created in 30 U.S.C. 921(c)(4) are violative of the United States Constitution.

(2) That the Secretary of Labor shall no longer seek to apply the irrebuttable presumption made by 30 U.S.C. 921(c)(3) or to limit evidence in rebuttal to the presumption created in 30 U.S.C. 921(c)(4).

(3) That all other provisions of the Act which have been considered are permissible legislation under the Federal Constitution.

(4) That all matters raised in the pleadings which are outside the jurisdiction of the three judge court are retained for consideration by the requesting judge.

This the 19 day of November, 1974.

Entered by direction of the court:

H. DAVID HERMANSDORFER,
Judge.

A true copy attest:

DAVIS T. MCGARVEY,
Clerk, U.S. District Court.
DOROTHY B. WOOD,
Deputy Clerk.

APPENDIX C

In the United States District Court for the Eastern District of Kentucky

Pikeville

Civil Action No. 1768

TURNER ELKHORN MINING COMPANY, A KENTUCKY CORPORATION, ET AL., PLAINTIFFS

v.

PETER J. BRENNAN, SECRETARY OF LABOR, ET AL., DEFENDANTS

DEFENDANTS' MOTION TO AMEND JUDGMENT

Defendants move for reconsideration and to amend the order of the court filed November 19, 1974, [sic] for the following reason:

Plaintiffs did not specifically contest sections 411 (e)(3) or 411(e)(4) of the Federal Coal Mine Health and Safety Act, 30 U.S.C. 921(e)(3) and 921 (e)(4), insofar as this court ruled those sections unconstitutional. Accordingly, the brief of the government did not address the issues ruled on by the District Court. The government wishes to present argument to the District Court respecting its two rulings, upon a briefing scheduled to be determined by

the court, rather than appeal directly to the Supreme Court without full consideration of its arguments by the District Court.

Respectfully submitted,

EUGENE E. SILER, JR.,
United States Attorney.

DAVID ORLIKOFF,
Department of Justice.

FRANK A. WHITE,
Attorney, Department of Labor.

CERTIFICATE

I hereby certify that on the 2nd day of December, 1974, I served the foregoing Motion by causing copies thereof to be mailed post first class postage pre-paid to

STEPHEN A. MILWID, Esq.
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EUGENE E. SILER, JR.,
United States Attorney.

APPENDIX D

While the motion to amend the judgment was pending in the district court the defendants filed a motion for stay pending reconsideration or appeal. The memorandum in support of that motion, containing arguments applicable to both the motion to amend judgment and the motion for stay, is set out below.

In the United States District Court for the Eastern District of Kentucky

Civil Action No. 1761

TURNER ELKHORN MINING CO., ET AL., PLAINTIFFS
v.
PETER J. BRENNAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, ET AL., DEFENDANTS

Memorandum in Support of Defendants' Motion For a Stay Pending Reconsideration or Appeal

PRELIMINARY STATEMENT

On November 20, 1974, this Court entered an order enjoining the defendant Secretary of Labor from seeking to enforce or apply the irrebuttable presumption contained in section 411(c)(3) of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, and the limitation of evidence clauses contained in section 411(c)(4) of such Act on the grounds that such provisions are violative of the United States Constitution.

It is appropriate for this Court to stay the effect of its order pending a reconsideration of the matters detailed herein or if such reconsideration is deemed unwarranted, pending a determination of these matters by the Supreme Court, since probable errors of fact and law are so manifest as to constitute improper grounds upon which to deprive, even temporarily, worthy black lung benefits claimants of the benefits provided for them under the Act.

ARGUMENT

1. The Court improperly declared the section 411(c)(3) presumption unconstitutional

A. This Court has declared the irrebuttable presumption contained in 30 U.S.C. 921(c)(3) (411(c)(3) of the Act) to violate the United States Constitution. The defendants submit that the issue of the constitutionality of section 411(c)(3) was not before the Court for determination.

Count II in plaintiffs' complaint in the instant case contains a detailed statement of those parts of section 411 of the Act alleged to be objectionable. In paragraph 9 of Count II plaintiffs enumerate verbatim from the statute those provisions at issue.[1] Section 411(1)(3) is not included in such enumeration. Nor is any mention made of 411(c)(3) at any other place in plaintiffs' complaint. Except for a description footnote on page 5 of plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion For Summary Judgment no mention is made of section 411(c)(3) in

[1] Plaintiffs' Complaint, p. 10.

plaintiffs' written arguments.[2] On May 2, 1974, this Court issued an order staying proceedings in the instant case pending a final determination of proceedings in *National Independent Coal Operators Association* v. *Brennan supra*, on the grounds that the issues in such case were "identical" to the issues in the instant case.[3] No question concerning section 411(c)(3) was present in the *National Independent* case and no mention of section 411(c)(3) was made by the Court in its decision in that case.

Defendants allege that they had no notice of the fact that the constitutional validity of section 411 (c)(3) was to be litigated in the instant case and accordingly were not granted an opportunity to be heard by this Court with respect to such issue.

It is a fundamental principle of law that:

> A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. [citations] * * * A party is no more entitled to recover on a claim not pleaded than he is to recover on a claim pleaded but not proved.

[2] The affidavit of E. T. Brown submitted by plaintiffs in support of their Motion for a Temporary Restraining Order presented September 24, 1974, mentions the fact that § 411(c)(3) was at issue in a case concerning plaintiff Alabama By-Products Corporation currently in the Department of Labor's administrative process. This passing mention of § 411(c)(3) within the context of another case hardly seems adequate to put defendants on notice that the section 411(c)(3) matter was at issue in the instant case.

[3] Notably, plaintiffs, in their Memorandum of Law in Opposition to Defendants' Motion for a Stay dated February 18, 1974, make no mention of § 411(c)(3). If plaintiffs felt § 411(c)(3) was at issue in their case, certainly this memorandum would have been the place to point out that fact since 411(c)(3) was clearly not at issue in the *National Independent* case.

Sylvan Beach Inc. v. *Koch*, 140 F. 2d 852, 861 (8th Cir. 1944). See also *Barnes* v. *Chicago, Milwaukee & St. Paul Ry.*, 122 U.S. 1, 14 (1887); *Armstrong Cork Company* v. *Lyons*, 366 F. 2d 206 (8th Cir. 1966); *Daniels* v. *Thomas*, 225 F. 2d 795, 797 (10th Cir. 1955); *cert. denied*, 350 U.S. 932.

As stated by the Supreme Court in *Standard Oil Co.* v. *Missouri*, 224 U.S. 270, 281–282 (1912), a court lacks jurisdiction to enter a judgment beyond what is justified by the pleadings:

> Even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted * * *.
>
> * * * * *
>
> [Such] judgments * * * would not be merely erroneous: they would be absolutely void because the court rendering them would transcend the limits of authority in those cases.

At page eight of its Memorandum Opinion in the instance case, this Court notes, "the pattern adopted in section 921(c)(3) is a departure from the overall pattern of the Act * * *." Defendants have had no notice or opportunity to be heard concerning the rationality of this "departure." The decision of this Court to strike down a provision of Federal law as violative of the Constitution without affording the parties affected an opportunity to make allegations and present arguments pertaining to such decision renders that portion of the decision a nullity.

B. If defendants were on notice that section 411 (c)(3) was an issue in the case, a demonstration of its validity would have been a simple matter. This Court has struck down section 411(c)(3) on the grounds that the irrebuttable presumption contained therein deprives an employer of the right to "present evidence as to the effect of a chronic dust disease upon an

individual in determining whether or not he is totally disabled."[4] It is true that 411(c)(3) purports to entitle an individual to benefits from his employer if such individual is a miner and is suffering from complicated or advanced pneumoconiosis, without reference to such individual's ability to continue working. Nonetheless, the presumption established by Section 411(c)(3) does not run contrary to the overall scheme of the Act in awarding benefits on the basis of total disability. In enacting this section, Congress legislated a fixed presumption that a miner whose lungs were wracked with massive lesions caused by black lung disease *is*, in the legislative judgment, *totally disabled* due to pneumoconiosis and should not be working, even though he may be able to perform some kinds of work. What is at issue here is a legislative judgment as to what constitutes total disability. Although the definition of total disability found in Section 402(f) of the Act may have general usage in other claims filed under the Act, there can be little doubt as to the constitutional power of Congress to qualify that definition for the benefit of those miners suffering from the physical affliction described and defined in Section 411(c)(3) of the Act. Thus, Congress has *not* awarded benefits on behalf of miners who are *not* totally disabled; Congress has only made a statement of law as to what constitutes total disability. Rather than doing so by the use of an "irrebuttable presumption," Congress could simply have added to the language of Section 402(f) to specify the physical condition now defined in Section 411 (c)(3). The manner of draftsmanship should not affect the validity of the Act.

Moreover, even if this Court were to construe Section 411(c)(3) as providing benefits for a condition less than "total disability," it has long been recog-

[4] Memorandum Opinion at 9.

less than "total disability," it has long been recognized that the legislature may authorize the recovery of such benefits from one's employer for less than totally disabling conditions. Compensation schemes of this sort, often termed "schedule benefits," are embodied in most State workers' compensation laws as well as in the Longshoremen's and Harbor Workers' Compensation Act.[5] Under such laws specified benefits are payable for certain employment related injuries or disabilities without regard to the injured employee's total or partial disability for work or loss of wages or wage earning capacity.[6]

Long ago the Supreme Court reviewed and approved the constitutionality of workmen's compensation provisions which provide benefits based solely upon medical facts to the exclusion of considerations of disability. In *New York Central R.R. Co.* v. *Bianc*, 250 U.S. 596, 602–603 (1919) the Supreme Court in sustaining a provision of New York law which provided compulsatory compensation benefits to an employee who suffered an employment-related facial disfigurement but no loss of ability to work held:

> [W]e cannot concede that impairment of earning power is the sole ground upon compulsatory compensation to injured workmen may be based. . . . [I]n our opinion the "due process of law" clause of the Fourteenth Amendment does not require the States to base compulsory compensation solely upon loss of earning power.
>
> * * * * *
>
> And we see no constitutional reason why a State may not, in ascertaining the amount of such compensation in particular cases, take into consideration any substantial physical impairment attributable to the injury, whether it immediately affects earning capacity or not.

[5] See 33 U.S.C. § 908(c).

[6] 2A Larsen, *Workmen's Compensation Law*, § 58.19, *et. seq.*

2. The Court improperly declared the limitations on evidence contained in section 411(c)(4) of the Act unconstitutional

In striking down the so-called limitations on the presentation of evidence tending to rebut the presumption contained in section 411(c)(4) of the Act this Court held that pneumoconiosis must cause total disability or death before a claimant's eligibility for benefits may be established and that to prohibit the presentation of evidence with respect to the question of total disability or death is unreasonable.[7] This question concerning *proof of total disability* within the context of 411(c)(4) was not raised as an issue by plaintiffs nor responded to by defendants in any of the papers filed in this action.

Section 411(c)(4) does not provide for a rebuttable presumption of total disability; it simply provides that where total disability from a respiratory or pulmonary impairment is otherwise proven, and where it can be shown that a miner has worked in a coal mine for fifteen years or more, there arises a rebuttable presumption that such total disability was due to pneumoconiosis. According to the plain language of Section 411(c)(4), proof of total disability from a respiratory or pulmonary impairment is a condition precedent to the operation of the rebuttable presumption contained therein. Thus, the rebuttable presumption that a miner's total disability or death arose from penumoconiosis arises *only*

> if a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's, his parent's, his brother's, his sis-

[7] Memorandum Opinion at 10.

> ter's, or his dependent's claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment * * *

Thus, the clear purpose and effect of the rebuttable presumption of Section 411(c)(4) is to draw a causal relationship between the already proven total disability resulting from a respiratory or pulmonary impairment and a miner's fifteen years of employment in underground coal mines. The limitations upon overcoming the rebuttable presumption of Section 411(c)(4) set forth in the last sentence thereof do not preclude the operator from disproving total disability since total disability must be proved independently.[8] Operation of the rebuttable presumption is specifically conditioned upon prior proof of total disability and fifteen years' employment in underground mines. 20 C.F.R. § 410.422 adopted by the Secretary of Labor in 20 C.F.R. Part 718 provides that unless a miner establishes total disability by the irrebuttable presumption contained in 411(c)(3), such miner must *in all cases* prove the fact of his total disability pursuant to the criteria set forth in 20 C.F.R. 410.412, 410.422, 410.424,

[8] Although the first portion of Section 411(c)(4) makes it clear that the rebuttable presumption arises only after total disability is established, the remaining portion may have been more clearly drafted to read: "* * * then there shall be a rebuttable presumption that such total disability of a miner was due to pneumoconiosis, that his death was due to pneumoconiosis, or that such total disability at the time of a miner's death was due to pneumoconiosis." Read in context as whole, however, the provision leaves no doubt but that the rebuttable presumption relates to the causal connection between years of employment in the mines and a totally disabling respiratory and pulmonary impairment, and not the existence of total disability itself.

and 410.426. Conversely, these provisions do not limit an operator's ability to present evidence tending to disprove a miner's total disability.

It is axiomatic that a legislative enactment is to be afforded every intendment of constitutionality and, further, that any court, when reviewing such enactment in light of the Constitution, must read the language in question to comport with the requirements of the Constitution if such interpretation is a reasonable one. 2A Sutherland, *Statutory Construction*, § 45.11 (4th ed. 1973).

Moreover, the Supreme Court has repeatedly ruled that "[t]he administrative interpretation of the Act by enforcing agency is entitled to great deference," *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433–34 (1971), so that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. * * *" *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381 (1969). See also *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). The construction and application of Section 411(c)(4) by the Secretary of Labor in his administration of Part C of the Act does not present the constitutional infirmities foreseen by this Court in its decision. Accordingly, the Court should recede from its previous interpretation of the Act in favor of the constitutional reading of section 411(c)(4) suggested by the Secretary.

3. *Certain claimants will suffer irreparable harm as a result of this Court's decision*

It is undeniable that as a result of this Court's decision an unknown number of claimant's will be denied benefits under the Act pending review of this Court's decision by the Supreme Court. The order of this Court prohibits the Secretary of Labor from applying both the Section 411(c)(3) presumption as well as the limitation on rebuttal evidence contained in Section 411(c)(4) under an interpretation of the latter section which the Secretary has never asserted before this Court or in the administration of Part C claims and which he specifically disclaims, for the Secretary's interpretation permits any relevant evidence on the issue of total disability itself to be considered initially. Nonetheless by memorandum dated December 2, 1974, operating personnel within the Department of Labor's Black Lung program have been instructed to comply with the order of this Court. It is estimated that as a result of such order at least 100 prospective black lung beneficiaries, all of whom are suffering from complicated pneumoconiosis but who cannot produce evidence of total disability within the meaning of this Court's decision, will be denied any and all benefits under the Act. Clearly, continued implementation of the Court's judgment, if such is premised upon a faulty construction of the Act, can only have a deleterious impact upon the administration of Part C claims.

CONCLUSION

In light of the foregoing, it is respectfully requested that this Court stay the operation and effect of its decision and order pending reconsideration of its de-

cision or if such reconsideration is deemed unwarranted, pending review by the Supreme Court.

Respectfully submitted,
WILLIAM J. KILBERG,
Solicitor of Labor.
MARSHALL H. HARRIS,
Associate Solicitor.
MARK E. SOLOMONS,
FRANK A. WHITE,
Attorneys,
U.S. Department of Labor.
PETER J. BRENNAN,
Secretary, U.S. Department of Labor.
Co-Counsel for Defendant.
CARLA A. HILLS,
Assistant Attorney General.
United States Attorney.
HARLAND F. LEATHERS.
DAVID ORLIKOFF.
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Attorneys,
U.S. Department of Justice.
CASPAR W. WEINBERGER,
Secretary,
U.S. Department of Health, Education and Welfare,
Counsel for Defendant.
PETER J. BRENNAN,
Secretary, U.S. Department of Labor,
Co-Counsel for Defendant.

APPENDIX E

In the United States District Court for the Eastern District of Kentucky
Pikeville

Civil Action No. 1761

(Filed, Dec. 17, 1974, at Cailettsburg, Davis T. McGarvey, Clerk, U.S. District Court)

TURNER ELKHORN MINING COMPANY, A KENTUCKY CORPORATION, ET AL, PLAINTIFFS

v.

PETER J. BRENNAN, SECRETARY OF LABOR, ET AL., DEFENDANTS

Notice is Hereby Given of the Entry of this Order or Judgment on December 18, 1974, Davis T. McGarvey, *Clerk;* Dorothy B. Wood, District of Columbia, *Deputy Clerk*

ORDER

Defendants have moved to amend the judgment herein on the ground that they did not have an opportunity to argue or brief the questions considered and determined with respect to statutory presumptions, 30 U.S.C. 921(c)(3), 921(c)(4). Plaintiffs respond pointing out that defendants are out of time under Rule 58(c), F.R.C.P., but notwithstanding that the Court has reconsidered the substantive aspects of defendants' motion, and the Court being sufficiently advised,

IT IS ORDERED that defendants' motion to amend the judgment be, and the same hereby is, OVERRULED for the reason that defendants did brief the questions raised by plaintiffs in their brief filed April 10, 1974 at pages 83 and following.

IT IS FURTHER ORDERED that the ruling herein made be considered a rule under Rule 54(b), F.R.C.P. for purposes of appeal inasmuch as aspects of a controversy have been found to be in the jurisdiction of a single judge court and could not, therefore, be considered by the three judge court which has entered its determination and this Order.

This the 17th day of December, 1974.

Entered by direction of the Court:

H. DAVID HERMANSDORFER,
Judge.

A true copy attest:

DAVIS T. MCGARVEY,
Clerk, U.S. District Court.
DOROTHY B. WOOD,
Deputy Clerk.

APPENDIX F

In the United States District Court for the
Eastern District of Kentucky
Pikeville

Civil Action No. 1761

TURNER ELKHORN MINING COMPANY, ET AL.,
PLAINTIFFS
v.
PETER J. BRENNAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, AND CASPAR W. WEINBERGER, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DEFENDANTS

Notice of Appeal, Filed January 16, 1975

Notice is hereby given that the Secretary of Labor and the Secretary of Health, Education and Welfare, defendants above named, hereby appeals to the Supreme Court of the United States from the final order of the district court entered on December 17, 1974, denying the defendant's motion filed December 2, 1974 to amend the district court's order entered on November 20, 1974.

This appeal is taken under Title 28, United States Code, Sec. 1253.

This 16th day of January, 1975.

EUGENE E. SILER, JR.,
United States Attorney.
JOHN M. COMPTON,
Assistant United States Attorney.

APPENDIX G

In the United States District Court
for the Eastern District of Kentucky
Pikeville

Civil Action No. 1761

TURNER ELKHORN MINING COMPANY, ET AL., PLAINTIFFS

v.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL., DEFENDANTS

MEMORANDUM OPINION AND ORDER

(Filed January 22, 1975)

This matter is before the Court upon the defendants' motion, pursuant to Rule 62, Federal Rules of Civil Procedure, and Rule 8, Federal Rules of Appellate Procedure, for a stay of the injunction heretofore entered herein pending defendants' appeal to the United States Supreme Court from the Order of this Court granting said injunction. The plaintiffs have filed a memorandum in opposition to the defendants' motion.

The defendants predicate their motion for a stay upon three (3) grounds which are as follows:

(1) The substance of this Court's Order of November 20, 1974 in respect to the constitutionality of 30 U.S.C. 921(c)(3) determines a matter not at issue in the case and about which they have not been af-

forded notice or an opportunity to present evidence is contrary to the law;

(2) The substance of such Order with respect to the constitutionality of the limitation on the presentation of evidence contained in 30 U.S.C. 921(c)(4) is based upon an erroneous construction of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. 801 *et seq.*; and,

(3) The injunction issued by this Court against the defendant Peter J. Brennan may result in irreparable and inestimable harm to certain individuals properly entitled to benefits under Subchapter IV of the Act.

Upon a consideration of the entire record, the defendants' motion will be overruled for the reasons set forth below.

The defendants' first basis for the relief sought amounts to a request for the Court to revisit its decision of December 17, 1974 overruling their motion for reconsideration. That invitation is declined as the Court finds the present argument advanced by the defendants to be remarkable in view of the contentions raised in their brief filed April 10, 1974, pp. 83–90.

Under a major subheading of that brief entitled "The Medical Standards and Presumptions Meet the Requirements of Equal Protection and Due Process of Law" the defendants specifically asserted the contention that Congress did not exceed the bounds of due process in enacting the presumptions contained in Subchapter IV of the Act. Furthermore, they argued that:

> * * * when viewed in light of the applicable case concerning the rationality of 'presumptions', those presumptions contained in section 411(c) of the Act (30 U.S.C. 921(c)) appear both reasonable and proper. (Defendants' Brief filed April 10, 1974, p. 86.)

Even upon an assumption that this issue was not raised in the pleadings, Rule 15(b), Federal Rules of Civil Procedure, would permit amendment of the same to encompass all issues raised before the Court, either expressly or impliedly.

The remaining alleged bases for granting of a stay shall be jointly considered and under the guidelines generally adopted by various courts for determining whether such relief should be granted. See, *7 Moore's Federal Practice,* ¶62.05 (2d ed. 1974).

First, the defendants have failed to make a strong showing that they are likely to prevail upon appeal. This Court based its judgment in reference to the unconstitutionality of certain aspects of the Act upon a careful consideration of established binding precedent. The defendants' argument suggests that the Supreme Court stands ready to depart from their announced position but no basis is found for that proposition.

Second, the defendants have not established that irreparable harm will result unless a stay is granted. Traditionally, the irreparable injury envisioned by Rule 62(c), Federal Rules of Civil Procedure, is one that presently threatens a litigant and does not harm something that the litigant fears will happen in the future. *Eastern Greyhound Lines* v. *Fusco,* 310 F. 2d 632, 634 (6th Cir. 1962).

Here, the defendants do not contend that they will suffer any present harm but, rather, that certain claimants under the Act will be denied benefits pending this appeal. However, this argument assumes the validity of the specified statutory presumptions and that the Secretary of Labor cannot, by exercise of his inherent powers suspend further administrative proceedings pending appellate review of this Court's decision. They further fail to recognize the nature of the

limitation placed upon the Secretary by the grant of injunctive relief. A miner suffering from complicated pneumoconiosis, if totally disabled by the disease, should have no particular problem in obtaining medical opinion evidence to that effect. In addition, it must be noted that the defendants have failed to demonstrate more than a prospective monetary injury to claimants under the Act. Damages of this nature do not constitute any basis for a stay of the injunction heretofore granted. *Eastern Greyhound Lines, Id.* at 654.

Finally, the defendants' motion for a stay fails to demonstrate how the public interest may be harmed should the stay not be granted.

Accordingly, IT IS ORDERED that the defendants' motion for a stay of the injunction issued on November 20, 1974 be, and it hereby is, OVERRULED.

This the 22 day of January, 1975.

By direction of the court:

H. DAVID HERMANSDORFER,
Judge.

A true copy attest:

DAVIS T. MCGARVEY,
Clerk, U.S. District Court.
LINDA L. YOUNG,
Deputy Clerk.

U.S. GOVERNMENT PRINTING OFFICE: 1976

Supreme Court, U. S.
FILED
MAY 23 1975
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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1302

JOHN T. DUNLOP, Secretary of Labor, and
CASPAR W. WEINBERGER, Secretary of Health,
Education, and Welfare,

Appellants,

v.

TURNER ELKHORN MINING COMPANY, et al.,

Appellees.

On Appeal from the United States District Court
for the Eastern District of Kentucky

BRIEF AMICUS CURIAE FOR THE UNITED MINE WORKERS OF AMERICA

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May 1975

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1302

JOHN T. DUNLOP, Secretary of Labor, and
CASPAR W. WEINBERGER, Secretary of Health,
Education, and Welfare,

Appellants,

v.

TURNER ELKHORN MINING COMPANY, et al.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Kentucky

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BRIEF AMICUS CURIAE FOR THE UNITED MINE WORKERS OF AMERICA

INTRODUCTION

The United Mine Workers of America submits this brief in support of appellants with the consent of counsel for both appellants and appellees.

Although appellants have presented two questions to the Court, this brief is addressed solely to the first, viz: whether § 411(c)(3) of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 921(c)(3), which

provides for compensation to miners with complicated pneumoconiosis whether or not the miner is functionally disabled, is consistent with the Constitution.

INTEREST OF AMICUS CURIAE

The United Mine Workers of America is a labor union that represents approximately 122,000 active and 90,000 retired coal miners. Eighty per cent of the working coal miners in the United States are members of the UMWA. The leadership and members of the UMWA were instrumental in securing passage of the Federal Coal Mine Health and Safety Act of 1969 and the Black Lung Benefits Act of 1972, which amended certain sections of Title IV of the 1969 Act. In addition, the UMWA has been involved for many years in efforts to improve workers' compensation programs in the coalfield states and in securing compensation benefits for its members. See *United Mine Workers* v. *Illinois State Bar Assn.*, 389 U.S. 217 (1967).

The constitution of the UMWA International Union provides for a special compensation fund in each district supported by a uniform compensation contribution paid out of the dues of all members.[1] In accordance with this provision of its constitution, the UMWA employs or retains attorneys who represent thousands of members and their survivors on federal black lung claims and on state workers' compensation claims.

The decision of the district court with respect to the constitutionality of § 411(c)(3) of the Act will have a serious adverse effect on thousands of UMWA members. It will require additional costly and arduous medical testing and

[1] Article XIII, Section 4 reads in part:

"Such compensation trust fund money shall be expended in all Districts uniformly only for expenses incurred assisting members in obtaining unemployment and workmen's compensation benefits, including black lung payments and, where possible, in assisting widows and dependents of former members."

increased litigation in the federal black lung claims of miners with medical proof that they suffer from complicated pneumoconiosis, a grave and advanced stage of coal mine workers' pneumoconiosis. It will take away a preventive health aspect of the Federal Coal Mine Health and Safety Act by depriving the Department of Labor of authority to notify miners suffering this advanced stage of the disease of their entitlements to benefits. It will bar the claims of widows and orphans of miners who suffered from complicated pneumoconiosis but who died in mine accidents or from other causes while working.

Appellants will concentrate on defending the action of Congress and their own interests as administrators of the program that Congress has established. The UMWA approaches the case as the representative of many of the miners, widows, and orphans who will be denied black lung benefits or who will encounter greater delay, expense, and discomfort in establishing their claims as a result of the lower court decision.

In addition, the UMWA enters this case with concern that the decision of the district court, if allowed to stand, may have a far-reaching and devastating impact on numerous provisions of state workers' compensation laws, because they may in turn be analyzed as irrebuttable presumptions depriving employers of due process of law. Underground coal mining causes a higher rate of occupationally related injury than any other major industry in this country.[2] As a result, coal miners and their union are grimly and inevitably concerned with the eligibility rules and procedures of state

[2] National Safety Council, *Accident Facts* 26 (1974). Underground coal miners suffer 35.44 disabling injuries per million worker hours as compared with 10.55 disabling injuries per million worker hours for industrial workers generally.

compensation programs.[3] The UMWA submits this brief amicus curiae and will submit a brief on the merits if jurisdiction is granted in order to assure that the broader ramification of this case for state compensation programs, as well as for the present and future of the federal black lung program, are fully presented to the Court.

THE CONSTITUTIONAL QUESTION IS SUBSTANTIAL

Complicated pneumoconiosis is an advanced form of coal mine workers' pneumoconiosis. It is diagnosed during life by opacities on an x-ray of a miner's lung which are larger than one centimeter in diameter. After death it is diagnosed by autopsy when a pathologist finds massive lesions in the lung larger than one centimeter in diameter caused by the accumulation of coal dust. In general, the complicated stage of pneumoconiosis develops only after a miner suffering from simple pneumoconiosis has had additional exposure to coal dust.[4]

Before enacting the Federal Coal Mine Health and Safety Act, Congress heard testimony that medical opinion was relatively unified on the following matters:

1. Complicated pneumoconiosis afflicts only a small proportion of coal miners.

2. Complicated pneumoconiosis ordinarily results in the total inability of a miner to engage in further coal mine work.

[3] For example, in West Virginia in fiscal year 1973, 20,647 claims were filed with the West Virginia Workmen's Compensation Fund for fatalities, injuries, and diseases suffered by coal miners. Table 19, West Virginia Workmen's Compensation Fund, *Annual Report for Year Ending June 30, 1974* (1975).

[4] Statements of Werner A. Laqueur, M.D., Paul Gross, M.D., Ira Higgins, M.D., Leon Cander, M.D., Hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, on S. 355, 91st Cong., 1st. Sess. Pt. 2, 695, 696, 760, 836-7, 857.

3. Complicated pneumoconiosis is ordinarily progressive. It continues to get worse even if the miner has no further exposure to coal dust.

4. Miners who suffer from complicated pneumoconiosis have a significantly shorter life expectancy than other miners as a result of their lung disease.[5]

Medical opinion continues to be relatively unified on these matters.[6]

Based on this medical information about complicated pneumoconiosis, Congress enacted § 411(c)(3), which provides that, when x-ray, autopsy, biopsy, or other medical evidence demonstrates that a miner is or was suffering from complicated pneumoconiosis, "there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis." In practical effect this provision means that a miner with x-ray, biopsy, or autopsy evidence of complicated pneumoconiosis may, without additional evidence, establish his eligibility for federal black lung benefits.

The district court ruled that § 411(c)(3) violates the coal operators' right to due process because it creates an irrebuttable presumption of total disability and forecloses any factfinding as to the effect of the disease on the individual miner's ability to work. In their jurisdictional statement, the Secretary of Labor and the Secretary of Health, Education, and Welfare stress that Congress did not create a genuine presumption in § 411(c)(3), but rather used the words "irrebuttable presumption" as a form of legislative shorthand to accomplish the fully constitutional purpose

[5] Statements of Eugene A. Creany, Esq., Werner A. Laqueur, M.D., William A. Stewart, M.D., Paul Gross, M.D., Ira Higgins, M.D., Leon Cander, M.D., Hearings on S. 355, *supra,* note 4, Pt. 1, 502, Pt. 2, 696, 720, 759-760, 840, 843-844, 846, 855, 857-858.

[6] *E.g.,* Morgan, *Respiratory Disease in Coal Miners,* 231 Journal of the American Medical Assn., at 1347 (March 31, 1975).

of awarding compensation to all miners who suffer from the complicated stage of pneumoconiosis. The UMWA is in full accord with that analysis of the statute.

Even assuming, however, that the district court could properly treat § 411(c)(3) as containing an irrebuttable presumption, the court erroneously held that provision unconstitutional.

The district court based its holding on the prior decisions of this Court in *Heiner* v. *Donnan,* 285 U.S. 312 (1932); *Stanley* v. *Illinois,* 405 U.S. 645 (1972); and *Vlandis* v. *Kline,* 412 U.S. 411 (1973). This Court has wrestled in those cases and others with the problem of determining when an irrebuttable presumption is an impermissible violation of due process. See also, *Bell* v. *Burson,* 402 U.S. 535 (1971); *U.S. Dept. of Agriculture* v. *Murry,* 413 U.S. 508 (1973); *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974). The line of cases identifying such irrebuttable presumptions lies at the intersection of equal protection and due process doctrine. This is an extremely important and sensitive area of law involving the essence of the legislative process, which creates categories and attaches certain rights, duties, or penalties to those categories. A vast array of legislative categories may be analyzed as irrebuttable presumptions even though they may not be labeled as such.

The district court's decision in this case is a departure from previous decisions of this Court because, as written, it stands for the proposition that every irrebuttable presumption, whether explicitly labeled so or not, is constitutionally defective. Moreover, it enters the area of compensation for occupational disease, where the intertwined legislative goals of prevention and prompt payment of benefits create the need for special forms of legislation, and it also touches upon the definition of "total disability," a highly subjective concept at best, bearing very different meanings from one government program to another. Yet the district court did not carefully analyze nor deeply consider these

problems; its entire reasoning on the subject is contained in a single paragraph. The court made no distinction between the words Congress used to accomplish its purpose and the actual content of its purpose. No prior decision of this Court suggests that there is any constitutional reason why Congress cannot require a coal operator to pay compensation benefits to any employee who has developed the complicated stage of pneumoconiosis as a result of his coal mine employment. This is a rational and humane provision, which this Court should restore to full operation at an early date.

Furthermore, the decision below has wide ramifications for many areas of the law besides the black lung benefits specifically at issue here. That decision, if affirmed, would permit the judicial invalidation of a host of similar legislative categories on the ground that they are unconstitutional irrebuttable presumptions. It could be extended to strike down the schedule benefits that appear in the workers' compensation laws of every American jurisdiction,[7] for there is no conceptual difference between providing a set level of benefits upon proof that a worker has lost a limb and providing benefits upon proof that a portion of a worker's lung has been choked off by the accumulation of coal dust. Compensation for disfigurement, which is authorized by statute in 41 states and by judicial ruling in five more,[8] would also come immediately under a constitutional cloud. This Court should review the decision of the district court in order to insure that other courts will not follow its lead in applying the irrebuttable presumption doctrine to strike down long-standing laws designed to ease the burdens of injured workers.

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[7] 2 Larson's *Workmen's Compensation* § 58.10. See also § 8(c) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 908(c), which is jeopardized by the lower court's decision.

[8] 2 Larson's *Workmen's Compensation,* §§ 58.30, 58.32.

CONCLUSION

For the foregoing reasons, probable jurisdiction of this appeal should be noted.

Respectfully submitted,

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May 1975

Supreme Court, U. S.
FILED
AUG 8 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

In The

Supreme Court of the United States

October Term, 1974

Nos. 74-1302 and 74-1316
Consolidated

JOHN T. DUNLOP, Secretary of the United States Department of Labor, et al.,

Defendants-Appellants,

vs.

TURNER ELKHORN MINING COMPANY, et al.,

Plaintiffs-Appellees.

TURNER ELKHORN MINING COMPANY, et al.,

Plaintiffs-Appellants,

vs.

JOHN T. DUNLOP, Secretary of the United States Department of Labor, et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Eastern District of Kentucky

NO. 74-1302 FILED APRIL 16, 1975
JURISDICTION NOTED JUNE 9, 1975

NO. 74-1316 FILED APRIL 18, 1975
JURISDICTION NOTED JUNE 9, 1975

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Civil Action No. 1761

In The
UNITED STATES DISTRICT COURT
For the Eastern District of Kentucky
at Pikeville

TURNER ELKHORN MINING COMPANY, a Kentucky corporation; SOUTH-EAST COAL COMPANY, a Kentucky corporation; RUSSELL FORK COAL COMPANY, a West Virginia corporation; PEABODY COAL COMPANY, a Delaware corporation; ZEIGLER COAL COMPANY, an Illinois corporation; ALABAMA BY-PRODUCTS CORPORATION, a Delaware corporation; AMHERST COAL COMPANY, a West Virginia corporation; ARCH MINERAL CORPORATION, a Delaware corporation; CF&I STEEL CORPORATION, a Colorado corporation; CANNELTON INDUSTRIES, INC., a West Virginia corporation; CARBON FUEL COMPANY, a West Virginia corporation; CENTRAL OHIO COAL COMPANY, an Ohio corporation; FREEMAN COAL MINING COMPANY, Division of Material Service Corporation, a Delaware corporation; HAWLEY COAL MINING CORPORATION, a West Virginia corporation; IMPERIAL COLLIERY COMPANY, a West Virginia corporation; KESSLER COALS, INC., a West Virginia corporation; MEARS COAL COMPANY, a Pennsylvania corporation; MILBURN COLLIERY COMPANY, a West Virginia corporation; OLD BEN COAL CORPORATION, a Delaware corporation; OMAR MINING COMPANY, a West Virginia corporation; SLAB FORK COAL COMPANY, a West Virginia corporation; THE NORTH AMERICAN COAL CORPORATION, an Ohio corporation,

Plaintiffs,

vs.

PETER J. BRENNAN, Secretary of the United States Department of Labor, an Agency of the Federal Government, and CASPAR W. WEINBERGER, Secretary of the United States Department of Health, Education and Welfare, an Agency of the Federal Government,

Defendants.

Before a Three-Judge District Court, The Hons. Pierce Lively, Circuit Judge, H. David Hermansdorfer and Bernard T. Moynahan, Jr., District Judges, Presiding

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Docket Entries

VOLUME ONE

1.	COMPLAINT filed.	8-8-73
2.	SUMMONS, with Marshal's Return, filed. (Executed 8/8/73)	9-10-73

3. DESIGNATION of Three Judge Panel filed. 9-20-73

4. FIRST REQUEST of plffs for production of documents filed. 9-27-73

5. FIRST SET OF INTERROGATORIES of plffs directed to deft BRENNAN filed. 10-1-73

6. MOTION of plffs to convene Three-Judge Court filed. 10-3-73

7. MEMORANDUM of plffs in support of motion to convene Three-Judge Court filed. 10-3-73

8. NOTICE of hearing on plffs' motion to convene Three-Judge Court at court's convenience filed. 10-3-73

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10. ANSWER of defts filed. 10-9-73

• • •

16. ANSWER of deft WEINBERGER to plffs' first request for production of documents filed. 11-12-73

17. ANSWER of deft BRENNAN to plffs' first request for production of documents filed. 11-12-73

18. ANSWERS of deft BRENNAN to plffs' first set of Interrogatories filed. 11-12-73

19. OBJECTIONS of deft BRENNAN to plffs' first request for production of documents filed. 11-12-73

20. MEMORANDUM of deft BRENNAN in support of objections to plffs' first request for production of documents filed. 11-12-73

21. OBJECTIONS of deft BRENNAN to plffs' first set of Interrogatories filed. 11-12-73

22. MEMORANDUM of deft BRENNAN in support of objections to plffs' first set of Interrogatories filed. 11-12-73

23. FIRST REQUEST of plffs for Admission of Fact filed. 11-21-73

24. SECOND SET OF INTERROGATORIES of plffs filed. 11-21-73

25. MOTION of deft WEINBERGER to dismiss action as to Sec., H.E.W., or in the alternative to drop Sec. H.E.W. as a misjoined party filed. 11-23-73

26. MEMORANDUM of deft WEINBERGER in support of motion to dismiss action as to Sec., H.E.W., etc. filed. 11-23-73

27. MEMORANDUM of plffs in opposition to deft WEINBERGER'S motion to be dismissed as party defendant filed. 12-3-73

28. MOTION of plffs to compel defts to produce documents and answer Interrogatories filed. 12-3-73

29. MEMORANDUM of plffs in support of motion to compel defts to produce documents and answer interrogatories filed. 12-3-73

30. NOTICE of plffs for hearing on motion to compel defts to produce documents, etc. at court's convenience. 12-3-73

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[Entries Nos. 31 through 52 note the filing of interrogatories directed to each of the plaintiffs by the Defendant Brennan which subsequently were withdrawn]

VOLUME TWO

53. ORDER: Motion of deft WEINBERGER assigned for hearing at Catlettsburg on 1/21/74 at 4:00 P.M. 12-12-73

54. REPLY MEMORANDUM of deft WEINBERGER in support of motion to dismiss Sec., H.E.W. as party deft filed. 1-8-74

55. NOTICE of plffs that on 1/21/74 plffs will request court to entertain argument and render decision on plffs' motion to compel defts to produce documents & answer interrogatories. 1-16-74

56. ANSWERS of defts to plffs Second Set of Interrogatories TENDERED. 1-21-74

57. OBJECTIONS of defts to plffs' Second Set of Interrogatories TENDERED. 1-21-74

58. MEMORANDUM of defts in support of objections to plffs' second set of Interrogatories TENDERED. 1-21-74

59. STATEMENT of defts in response to plffs' first request for admissions of fact TENDERED 1-21-74

60. ORDER: HEARING AT CATLETTSBURG on 1/21/74: court took motion of deft WEINBERGER to be dismissed as party defendant under advisement. 1-22-74

61. MOTION of defts for stay of proceedings filed. 2-7-74

62. NOTICE of defts of hearing on motion for stay at court's convenience filed. 2-7-74

63. STATEMENT of Points & Authorities of defts in support of motion for stay of proceedings filed, with Exhibits A & B. 2-7-74

64. MOTION of plffs for summary judgment filed. 2-15-74

64a. AFFIDAVIT of J. Huell Briscoe filed. 2-15-74

64b. Document Re William Thompson, et al. 2-15-74

64c. Document Re William Thompson. 2-15-74

64d. Document Re Claude Pennington. 2-15-74

64e. Document Re Cecil Purnell. 2-15-74

64f. Document Re Andrew Smith. 2-15-74

64g. Document Re Alva A. Libby. 2-15-74

64h. Document Re Craig Fulton. 2-15-74

65. MEMORANDUM of plffs in support of motion for summary judgment filed. 2-19-74

65a. APPENDIX to plffs' memorandum in support of motion for summary judgment filed. 2-19-74

66. MEMORANDUM of plffs in opposition to defts' motion for a stay of proceedings filed. 2-20-74

67. ORDER: Assigned for hearing on all pending motions on 3/4/74. 2-21-74

• • •

69. MOTION of plffs for leave to file supplemental affidavit in support of motion for summary judgment filed. 2-27-74

70. AFFIDAVIT of George W. Wright TENDERED. 2-27-74

71. MOTION of defts to file Exhibit A in support of motion for extension of time filed. 2-28-74

72. Exhibit A—Copy Opinion in National Independent Coal Operator's Association, et al vs: Brennan and Association of Bituminous Contractors, Inc., et al v. Brennan TENDERED. 2-28-74

73. ORDER: HEARING ON ALL PENDING MOTIONS ON MARCH 4, 1974; defts' motion for a stay of proceedings sustained; stay effective until 4/22/74 except that defts shall file their response to plffs' motion for summary judgment no later than 20 days from date of this order. 3-5-74

• • •

75. ORDER: defts given to & including 4/10/74 to file response to plffs' motion for summary judgment. 3-18-74

VOLUME THREE

76. MOTION of defts to strike affidavits and other documents in support of plffs' motion for summary judgment filed. 4-10-74

77. STATEMENT OF POINTS & AUTHORITIES of defts in support of motion to strike filed. 4-10-74

78. MOTION of defts to dismiss and cross-motion for summary judgment filed. 4-10-74

78a. Copy of decision of three-judge court in National Independent Coal Operator's Association, et al v. Brennan, Civil Action No. 1711-13 (D.C. 2/21/74). 4-10-74

79. MEMORANDUM of defts in support of motion to dismiss and cross-motion for summary judgment filed. 4-10-74

79a. Exhibits of deft. 4-10-74

80. NOTICE of defts for hearing on motion to dismiss & cross-motion for summary judgment, motion to strike affidavits & other documents in support of plffs' motion for summary judgment at court's convenience. 4-10-74

• • •

82. TRANSCRIPT of hearing at Catlettsburg on 1/21/74 filed by Official Reporter. 4-25-74

• • •

84. ORDER: all proceedings stayed pending appeal in National Independent Coal Operators Association, et al v. Brennan. 5-2-74

85. MEMORANDUM of plffs in response to defts' motion to dismiss, cross-motion for summary judgment and motion to strike TENDERED. 5-10-74

86. MOTION of plffs to vacate stay and application for preliminary injunction filed. 5-31-74

87. MEMORANDUM of plffs in support of plffs' motion to vacate stay and application for preliminary injunction filed. 5-31-74

88. NOTICE of plffs for hearing on foregoing motions at court's convenience filed. 5-31-74

• • •

91. TRANSCRIPT of Hearing at Pikeville on 3/4/74 filed by Official Reporter. 6-10-74

92. STATEMENT of defts in opposition to plffs' motion to vacate stay filed. 6-20-74

93. MEMORANDUM of defts in opposition to plffs' motion to vacate stay filed. 6-20-74

94. STATEMENT of defts in opposition to plffs' application for preliminary injunction filed. 6-20-74

95. MEMORANDUM of defts in opposition to plffs' application for preliminary injunction filed. 6-20-74

96. MOTION of plffs for hearing on their motion to vacate stay and application for preliminary injunction at earliest possible time filed. 6-21-74

97. REPLY MEMORANDUM of plffs in support of motion to vacate stay and applition for preliminary injunction filed. 7-3-74

98. ORDER: Assigned for hearing at Catlettsburg on 9/24/74 at 1 PM on plffs' motion to vacate stay. 9-6-74

99. MOTION of plffs for temporary restraining order filed. 9-18-74

99a. AFFIDAVIT of E. T. Brown, Jr. filed. 9-18-74

99b. NOTICE of hearing on foregoing motion at Catlettsburg on 9/24/74 filed. 9-18-74

100. MOTION of defts to strike plffs' application for temporary restraining order filed. 9-24-74

101. STATEMENT of defts in support of continuance of stay order and in opposition to plffs' motion to vacate stay order filed. 9-24-74

101a. AFFIDAVIT of Frank H. Easterbrook filed. 9-24-74

102. STATEMENT of defts in opposition to plffs' motion for temporary restraining order filed. 9-24-74

102a. AFFIDAVIT of Nancy Snyder filed. 9-24-74

103. MEMORANDUM of defts in opposition to plffs' motion for temporary restraining order filed. 9-24-74

VOLUME FOUR

104. ORDER: HEARING AT CATLETTSBURG on 9/24/74; Assigned for hearing before three-judge court at Lexington on 10/4/74 at 2 PM. 9-25-74

105. SUPPLEMENTAL STATEMENT of defts in support of motion to strike filed. 10-4-74

105a. Copy Opinion Larry William Kelly, et al v. Brennan (Civil 74-450, D.Ore. 9/13/74).

106. SUPPLEMENTAL BRIEF of defts in support of motion to dismiss & cross-motion for summary judgment filed. 10-4-74

106a. Brief of Appellee, National Independent Coal Operator's Association v. Brennan, Sup. Court No. 73-1902, Oct. Term, 1974.

107. ORDER: HEARING AT LEXINGTON on 10/4/74 before three-judge panel; matter taken under advisement; all pending motions held in abeyance. 10-8-74

• • •

112. MEMORANDUM OPINION of three-judge court filed. 11-19-74

113. ORDER: (1) Irrebuttable presumption set forth in 30 USC 921(c)(3) and the limitation of evidence necessary to rebut the presumption created by 30 USC 921(c)(4) are violative of the U. S. Constitution; (2) Sec. of Labor shall no longer seek to apply the irrebuttable presumption made by 30 USC 921(c)(3) or to limit evidence in rebuttal to the presumption created in 30 USC 921(c)(4); (3) all other provisions of the Act which have been considered are permissible under the Fed. Const.; (4) all matters raised in the pleading outside the jurisdiction of the three-judge court are retained for consideration by requesting judge. 11-19-74

114. MOTION of defts to amend the judgment filed. 12-2-74

115. MOTION of plffs to set for hearing issues raised but not resolved by 11/19/74 decision of three-judge court filed. 12-12-74

116. OBJECTIONS of plffs to defts' motion to amend judgment filed. 12-13-74

117. ORDER: defts' motion to amend judgment overruled; this ruling may be considered a rule under Rule 54(b), FRCP, for purposes of appeal. 12-17-74

118. MOTION of defts for a stay pending reconsideration or appeal filed. 12-26-74

119. MEMORANDUM of defts in support of motion for a stay pending reconsideration or appeal filed. 12-26-74

• • •

121. SUPPLEMENTAL MEMORANDUM of defts in support of motion to dismiss & cross-motion for summary judgment filed. 12-26-74

122. MOTION of plffs for leave to file response to defts' motion for stay pending appeal and defts' supplemental memorandum in support of their motion to dismiss filed. 1-9-75

123. MEMORANDUM of plffs in opposition to defts' motion for stay pending appeal filed. 1-10-75

123a. Document: Re—William Norman.

123b. Document: Re—James W. Nahas.

123c. Document: Re—Wedsel Toppings.

• • •

126. NOTICE OF APPEAL filed by defts. 1-16-75

127. NOTICE OF APPEAL filed by plffs. 1-20-75

128. RESPONSE of plffs to defts' supplemental memorandum in support of their motion to dismiss & motion for summary judgment TENDERED. 1-20-75

129. MEMORANDUM OPINION & ORDER: defts' motion for stay of the injunction issued on 11/20/74 is overruled. 1-22-75

DEPOSITIONS FILED

DEPOSITION NO. 1—Nancy Snyder, filed Jan. 21, 1974

DEPOSITION NO. 2—National Council on Compensation Insurance by GEORGE F. REALL filed Feb. 25, 1974

[Jurat omitted in printing]

Civil Action No. 1761

In The
UNITED STATES DISTRICT COURT
For the Eastern District of Kentucky
at Pikeville

[Title omitted in printing]

Complaint For Injunction And Declaratory Relief

Jurisdiction

1. This is a civil action arising under the Constitution and laws of the United States. The matter in controversy exceeds the value of $10,000.00, exclusive of interest and costs. The Court's jurisdiction is invoked pursuant to Section 1331 of Title 28 of the United States Code.

2. Plaintiffs seek to enjoin implementation and enforcement of Part C of Title IV of the Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742, 30 U.S.C. §§901, *et seq.*, as amended, May 19, 1972, Pub. L. 92-303, 86 Stat. 150) on the ground that said statute on its face and as applied by the Defendants violates rights secured to Plaintiffs by the Constitution of the United States. Plaintiffs also seek declaratory relief concerning the proper interpretation of certain provisions of said statute.

3. Convocation of a three-judge court is required in this action by and pursuant to Sections 2282 and 2284 of Title 28 of the United States Code.

Parties

1. Plaintiffs are corporations organized for the purpose, *inter alia*, of engaging in the business of mining coal. Plaintiffs' names, states of incorporation, principal places of business, and the states in which they are conducting coal mining operations are:

Plaintiff	Incorporated In:	Principal Place Of Business At:	Operating Mines In:
Turner Elkhorn Mining Company	Ky.	Drift, Ky.	Ky.
South-East Coal Company	Ky.	Paintsville, Ky.	Ky.
Russell Fork Coal Company	W.Va.	Elkhorn City, Ky.	Ky.
Peabody Coal Company	Del.	St. Louis, Mo.	Ky.,Ala.,Ariz., Ark.,Colo.,Ind., Ill.,Ohio,Okla., Mo.,Mont.,Utah
Zeigler Coal Company	Ill.	Chicago, Ill.	Ky.,Ill.
Alabama By-Products Corporation	Del.	Birmingham, Ala.	Ala.
Amherst Coal Company	W.Va.	Port Amherst, W.Va.	W.Va.
Arch Mineral Corporation	Del.	St. Louis, Mo.	Ala.,Ill.,Wyo.
CF&I Steel Corporation	Colo.	Pueblo, Colo.	Colo.
Cannelton Industries, Inc.	W.Va.	Cannelton, W.Va.	W.Va.
Carbon Fuel Company	W.Va.	Charleston, W.Va.	W.Va.
Central Ohio Coal Company	Ohio	Cumberland, Ohio	Ohio
Freeman Coal Mining Company, Division of Material Service Corporation	Del.	Chicago, Ill.	Ill.
Hawley Coal Mining Corporation	W.Va.	Keystone, W.Va.	W.Va.
Imperial Colliery Company	W.Va.	Lynchburg, Va.	W.Va.
Kessler Coals, Inc.	W.Va.	Whitesville, W.Va.	W.Va.
Mears Coal Company	Pa.	Marion Center, Pa.	Pa.
Milburn Colliery Company	W.Va.	Lynchburg, Va.	W.Va.
Old Ben Coal Corporation	Del.	Chicago, Ill.	Ill.,Ind.,Va.
Omar Mining Company	W.Va.	Madison, W.Va.	W.Va.
Slab Fork Coal Company	W.Va.	Slab Fork, W.Va.	W.Va.
The North American Coal Corporation	Ohio	Cleveland, Ohio	Ohio,Pa.,N.D.

2. Defendant Peter J. Brennan is Secretary of the United States Department of Labor, and is named as a Defendant herein in his capacity as an officer of the United States.

3. Defendant Caspar W. Weinberger is Secretary of the United States Department of Health, Education and Welfare, and is named as a Defendant herein in his capacity as an officer of the United States.

COUNT I

1. Plaintiffs presently are engaged in the mining of coal at numerous mining sites in seventeen states. Together, Plaintiffs employ over 28,000 miners and produce approximately 134,300,000 tons of coal each year. Each of the Plaintiffs is subject to present and future obligations and liabilities created and imposed upon them by Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. §§ 901, *et seq.*, as amended by the Black Lung Benefits Act of 1972, Public Law 92-303, 86 Stat. 150, a true and correct copy of which is attached hereto as Exhibit A.

2. The Federal Coal Mine Health and Safety Act of 1969 was enacted to establish stringent health and safety standards for underground coal mines, especially with respect to dust conditions prolonged exposure to which over many years may contribute to development of a chronic respiratory disease known as coal workers' pneumoconiosis. In addition to specifying numerous health and safety standards to govern mining operations, Congress, in Title IV of the Act, as amended by the Black Lung Benefits Act of 1972, created a program of economic relief for miners and former miners who have contracted respiratory ailments which are presumed to be coal workers' pneumoconio-

sis and who are presumed to be, or are found to be, "totally disabled"—as that term is defined in the Act—by coal workers' pneumoconiosis, and the surviving dependents of miners and former miners who have died of the disease, or who are presumed to have been "totally disabled" by the disease at the time of their deaths.

3. Under said Title IV, the Federal Government, through the Department of Health, Education and Welfare, is required to pay life-time benefits to such persons who have filed claims therefor during the period December 30, 1969 through June 30, 1973. During the period July 1, 1973 through December 31, 1973, the benefits program is to be administered by both of the Defendants herein, pursuant to Regulations jointly promulgated by them. Beginning January 1, 1974, Plaintiffs and all other coal mine operators will be liable under the law for payment of such benefits to such persons who have filed claims since June 30, 1973, as well as those who file claims after December 31, 1973. This liability is to be enforced by the Defendant Secretary of Labor, unless the claimant resides in a state that has enacted a workmen's compensation statute recognized by said Defendant as affording coverage and benefits equivalent to those of the federal law. At the time of filing of this complaint no state's law had been so recognized by said Defendant.

4. Under said Title IV, Plaintiffs will be held liable to pay benefits not only to their present and future employees who become disabled by coal workers' pneumoconiosis arising out of their employment, but also to: (a) persons not now employed as mine workers who were formerly employed by them, either before or after enactment of the law; (b) persons formerly employed by them before or after enactment of the law, who are now employed by

other mine operators; (c) the former and present employees of any mine acquired by them since December 30, 1969; (d) the surviving wife, children, parents, brothers or sisters of the persons described in (a), (b) and (c) above, whether or not such persons died while in their employ either before or after enactment of the law, or were receiving benefits under the law at the time of death.

5. The scope of the benefits provided for under said Title IV as administered by Defendants is such that each claim allowed against a coal mine operator will represent a potential liability having a present value of approximately sixty to ninety thousand dollars, which amounts to an industry-wide potential cost under the benefits program of approximately two to five dollars per ton of coal at an annual production of 600 million tons.

6. Under Section 423 of said Title IV, all present and former coal mine operators are required to secure the payment of benefits for which they are liable under the law by either qualifying as a self-insurer in accordance with regulations established by the Defendant Secretary of Labor, or by insuring the payment of such benefits with an insurance carrier or state fund.

7. The cost of insuring or self-insuring the payment of such benefits as required by said Section 423 is prohibitive for substantial numbers of coal mine operators. Plaintiffs are informed and do believe that some coal mine operators are financially incapable of self-insuring said liability, and that some of said coal mine operators have or will be required to cease doing business as a direct result of their inability to comply with the provisions of said Section 423, or as an indirect result of the onerous economic burdens imposed upon them by said Title IV.

8. The new liabilities created by said Title IV directly and indirectly will cause Plaintiffs immediate substantial and irreparable injury, for which they have no adequate remedy at law, and will have a seriously adverse impact upon the economy of the coal mining industry and the nation's energy resources generally.

9. The liability thus imposed upon Plaintiffs is to compensate miners or their survivors for disabilities incurred prior to the enactment of the law under coal production conditions and coal marketing conditions that did not and could not have reflected such potential liability. The imposition of such liability upon Plaintiffs is a manifestly arbitrary and unreasonable means for providing economic relief to past victims of coal workers' pneumoconiosis and therefore deprives Plaintiffs of the fundamental fairness and equal protection of law guaranteed them by the Fifth Amendment to the United States Constitution.

10. The matters herein alleged are the subject of a present and actual controversy between Plaintiffs and Defendants. Plaintiffs are without an adequate remedy at law for the substantial and irreparable injury with which they are threatened and require interlocutory injunctive relief to protect and preserve their rights. The granting of such relief would not interfere with the continuing processing and payment of claims by Defendant Secretary of Labor under Part C of said Title IV, because said Defendant expressly is required to pay such claims out of Federal funds, pursuant to the mandate of Clause (2) of Section 424 of said Part, which provides that in cases where ". . . there is no operator who was required to secure the payment of such benefits, the Secretary shall pay such miner, or such widow, child, parent, brother or sister the benefits to which he or she is so entitled."

Wherefore, Plaintiffs pray that this Court grant them interlocutory and permanent injunctive relief restraining the Defendants, and each of them, and their agents and successors, from implementing and/or enforcing against Plaintiffs the provisions of Part C of Title IV of the Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, including but not limited to: (1) the provision of Section 422 of said Part C imposing liability upon Plaintiffs for the payment of benefits provided for under said law; and (2) the provisions of Section 423 of said Part C requiring Plaintiffs to secure payment of said benefits through insurance or self-insurance; and that the Court enter its order expressly directing the Defendant Secretary of Labor to pay benefits upon all claims heretofore and hereafter allowed by him under said Part C pursuant to the mandate of Clause (2) of Section 424 of said Part.

COUNT II

1-8. Plaintiffs repeat and reallege Paragraphs 1 through 8 of Count I as Paragraphs 1 through 8 of this Count II as though fully set forth herein.

9. Claims filed against coal mine operators under Part C of said Title IV are to be adjudicated upon the basis of certain presumptions established in Section 411(c) of Part B, which provides in relevant part that:

> "(1) if a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that this pneumoconiosis arose out of such employment;
>
> (2) if a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable

presumption that his death was due to pneumoconiosis;

• • •

(4) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's, his parent's, his brother's, his sister's or his dependent's claim under this title and it is interpreted as negative . . . , and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. • • •"

10. Although termed "rebuttable" presumptions on the face of the statute, the presumptions established in Clauses (2) and (4) of said Section 411(c), as applied by Defendants, are in fact irrebuttable, because there is no practical method of rebutting such presumptions in the vast majority of cases in which they will operate against Plaintiffs.

11. Whether considered to be "rebuttable" or "irrebuttable", the presumptions established by said Clauses (2) and (4) are arbitrary and irrational bases upon which to predicate coal mine operators' liability for any and all claims for which they are made responsible under Part C, because there is no rational connection between the facts to be proved to invoke the presumptions and the ultimate facts to be presumed.

12. The ten-year presumptions established by Clauses (1) and (2) of said Section 411(c) are arbitrary and irrational as applied to claims arising in whole or part out

of periods of employment during which dust regulations established by the Coal Mine Health and Safety Act of 1969 are in force, because the facts to be proved to invoke said presumptions have no rational connection to the ultimate fact to be presumed.

13. Application of said presumptions in the adjudication of claims for which Plaintiffs may be held liable under Part C of said Title IV will expose Plaintiffs to liability for the payment of benefits to substantial numbers of miners or their survivors: (1) who are not or were not in fact totally disabled by a respirable disease, (2) who suffer or suffered from a respirable disease other than pneumoconiosis, or (3) who did not develop pneumoconiosis as a result of employment in mining, all in violation of Plaintiffs' right to due process of law under the Fifth Amendment to the United States Constitution.

14. The matters herein alleged are the subject of a present and actual controversy between Plaintiffs and Defendants. Plaintiffs are without an adequate remedy at law for the substantial and irreparable injury with which they are threatened, and require interlocutory injunctive relief to protect and preserve their rights. The granting of such relief would not interfere with the continuing processing and payment of claims by Defendant Secretary of Labor under Part C of said Title IV, because said Defendant expressly is required to pay such claims out of Federal funds, pursuant to the mandate of Clause (2) of Section 424 of said Part, which provides that in cases where ". . . there is no operator who was required to secure the payment of such benefits, the Secretary shall pay such miner, or such widow, child, parent, brother or sister the benefits to which he or she is so entitled."

Wherefore, Plaintiffs pray that this Court grant them interlocutory and permanent injunctive relief restraining the Defendants, and each of them, and their agents and successors, from imposing liability upon Plaintiffs for payment of benefits on all claims allowed under Part C of said Title IV upon the basis of facts presumed pursuant to the provisions of Clauses (2) and (4) of Section 411(c) of Part B of said Title, and from imposing such liability upon the basis of facts presumed pursuant to Clauses (1) and (2) of said Section in cases where the claim arises in whole or part out of periods of employment subsequent to the effective date of the dust control requirements of the Coal Mine Health and Safety Act of 1969, and that this Court enter its order expressly directing the Defendant Secretary of Labor to pay benefits upon all claims heretofore and hereafter allowed by him under said Part C pursuant to the mandate of Clause (2) of Section 424 of said Part.

COUNT III

1-8. Plaintiffs repeat and reallege Paragraphs 1 through 8 of Count I as Paragraphs 1 through 8 of this Count III, as though fully set forth herein.

9. Section 422(h) of said Title IV directs the Defendant Secretary of Labor to establish by regulations:

> ". . . standards, which may include appropriate presumptions, for determining whether pneumoconiosis arose out of employment in a particular coal mine or mines. The Secretary may also, by regulation, establish standards for apportioning liability for benefits under this subsection among more than one operator, where such apportionment is appropriate."

Pursuant to said Section 422(h), said Defendant has promulgated regulations designated as Subpart D of Part

725 of Subchapter B of Chapter VI of Title 20 of the Code of Federal Regulations, effective November 30, 1972.

10. In Section 725.311 of said Subpart D (20 CFR 725.311) said Defendant has established an irrebuttable presumption that a miner's work-related pneumoconiosis arose in whole or in part sufficiently to occasion liability, out of his employment with the coal mine operator for whom he most recently worked a cumulative year, and such operator accordingly is to be liable for payment, and securing through insurance or self-insurance the payment of the benefits awarded the miner, if the operator is financially capable of doing so. If that operator is not so capable, the presumption applies against the operator by whom the miner was employed the next-most recent cumulative year, until a "responsible operator", if any, is found.

11. Said presumptions are arbitrary and irrational, and are not "appropriate" presumptions within the meaning of Section 422(h) of said Title IV, because: (a) there is no rational connection between a miner's most recent one-year cumulative employment by a particular operator and development in the miner of coal worker's pneumoconiosis; and (b) there is no rational connection between a coal mine operator's financial ability to insure payment of said benefits, and the development of said disease in said miner.

12. Enforcement of said presumptions against Plaintiffs will result in imposition of liability upon them for payment of benefits without due process of law, in violation of rights secured to them by the Fifth Amendment to the United States Constitution.

13. The matters herein alleged are the subject of a present and actual controversy between Plaintiffs and Defendants. Plaintiffs are without an adequate remedy at

law for the substantial and irreparable injury with which they are threatened, and require interlocutory injunctive relief to protect and preserve their rights. The granting of such relief would not interfere with the continuing processing and payment of claims by Defendant Secretary of Labor under Part C of said Title IV, because said Defendant expressly is required to pay such claims out of Federal funds, pursuant to the mandate of Clause (2) of Section 424 of said Part, which provides that in cases where ". . . there is no operator who was required to secure the payment of such benefits, the Secretary shall pay such miner, or such widow, child, parent, brother or sister the benefits to which he or she is so entitled."

Wherefore, Plaintiffs pray that this Court—

A. Declare 20 CFR §725.311 void and of no effect as in excess of and contrary to the authority delegated the Defendant Secretary of Labor by Section 422(h) of said Title IV, and grant Plaintiffs interlocutory and permanent injunctive relief restraining said Defendant, his agents and successors from enforcing liability against Plaintiffs for the payment of any and all claims adjudicated pursuant to such Regulation;

B. In the alternative, if this Court should find that said Defendant was acting pursuant to authority granted him under Section 422(h) of said Title IV in promulgating 20 CFR §725.311, Plaintiffs pray that this Court declare said Section 422(h) void and of no effect as inconsistent with rights secured to Plaintiffs by the Fifth Amendment to the United States Constitution, and grant the Plaintiffs the injunctive relief prayed for in Paragraph A above; and

C. Enter its order expressly directing said Defendant to pay benefits upon all claims heretofore and hereafter allowed by him under Part C of Title IV pursuant to the mandate of Clause (2) of Section 424 of said Part.

COUNT IV

1-8. Plaintiffs repeat and reallege Paragraphs 1 through 8 of Count I as Paragraphs 1 through 8 of this Count IV, as though fully set forth herein.

9. The Black Lung Benefits Act of 1972 amended Section 422(a) of Part C of said Title IV to include medical benefits (as provided for in Section 7 of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC §907) among those benefits that coal mine operators must pay after December 31, 1973 in connection with claims allowed against them after June 30, 1973.

10. Defendant Secretary of Labor has interpreted said amendment as requiring that after December 31, 1973, coal mine operators insure the payment of, and pay, such medical benefits to persons who have filed claims and been awarded life-time Federal benefits under Part B of said Title IV prior to July 1, 1973, and in implementation thereof has promulgated Regulations so providing at 20 CFR §720.109(a).

11. Defendant Secretary of Labor's interpretation of said amendment is unwarranted, unlawful, contrary to the clear intent and meaning of said Title IV, and in excess of his authority under said Title. Enforcement of Section 422(a) as interpreted and implemented by said Defendant will result in the imposition of liability upon Plaintiffs for the payment of medical benefits in cases previously adjudicated by the Defendant Secretary of Health, Education and Welfare, substantial numbers of which involve false, fraudulent, or grossly excessive claims improperly allowed by said Defendant, and in none of which were Plaintiffs given

any notice or opportunity to be heard and present proof on the merits of said claims, all in violation of the due process of law guaranteed Plaintiffs by the Fifth Amendment to the United States Constitution.

12. The matters herein alleged are the subject of a present and actual controversy between Plaintiffs and Defendants. Plaintiffs are without an adequate remedy at law for the substantial and irreparable injury with which they are threatened, and require interlocutory injunctive relief to protect and preserve their rights. The granting of such relief would not interfere with the continuing processing and payment of claims by Defendant Secretary of Labor under Part C of said Title IV, because said Defendant expressly is required to pay such claims out of Federal funds, pursuant to the mandate of Clause (2) of Section 424 of said Part, which provides that in cases where ". . . there is no operator who was required to secure the payment of such benefits, the Secretary shall pay such miner, or such widow, child, parent, brother or sister the benefits to which he or she is so entitled."

Wherefore, Plaintiffs pray that this Court—

A. Declare 20 CFR §720.109(a) void and of no effect as contrary to the clear intent and meaning of Section 422(a) of said Title IV and in excess of and contrary to the authority delegated the Defendant Secretary of Labor by said Title IV, and grant Plaintiffs interlocutory and permanent injunctive relief restraining said Defendant, his agents and successors, from soliciting, entertaining or allowing the refiling of claims allowed by the Defendant Secretary of Health, Education and Welfare prior to July 1, 1973, for purposes of imposing liability upon Plaintiffs for the payment of medical benefits to such claimants in the future;

B. In the alternative, if this Court should find that said Defendant was acting pursuant to and consistent with said Section 422(a) in promulgating 20 CFR §720.109(a), Plaintiffs pray that this Court declare said Section 422(a) void and of no effect as inconsistent with rights secured to Plaintiffs by the Fifth Amendment to the United States Constitution, and grant Plaintiffs the injunctive relief prayed for in Paragraph A above.

C. In the further alternative, if this Court should find that said refilings and payments are permissible under said Section 422(a), then Plaintiffs pray that this Court enter its order expressly directing said Defendant to make such payments pursuant to the mandate of Clause (2) of Section 424 of Part C of said Title IV.

/s/ Lord, Bissell & Brook
135 South LaSalle Street
Chicago, Illinois 60603
Telephone: 312-786-6328

By: /s/ Stephen A. Milwid
/s/ R. R. McMahan
Boehl, Stopher, Graves & Deindoerfer
2300 Louisville Trust Bank Building
One Riverfront Plaza
Louisville, Kentucky 40202
Telephone: 502-589-5980

By: James M. Graves
Attorneys for Plaintiffs

[Copy of statute attached as Exhibit to complaint omitted in printing]

Civil Action No. 1761

In The
UNITED STATES DISTRICT COURT
For the Eastern District of Kentucky at Pikeville
[Title omitted in printing]

Answer

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The Court lacks jurisdiction over the subject matter.

Third Defense

Responding specifically to the numbered paragraphs of the complaint, defendants state:

Jurisdiction

1-3. These paragraphs set forth conclusions of law and plaintiffs' statement of the case and not allegations of fact for which an answer is required, but insofar as an answer is required, they are denied.

Parties

1. Denied for lack of information or knowledge sufficient to determine the truth of the allegations.

2. Denied except to admit that Peter J. Brennan is Secretary of the United States Department of Labor.

3. Denied except to admit that Caspar W. Weinberger is Secretary of the United States Department of Health, Education and Welfare.

Count I

1. Denied for lack of information or knowledge sufficient to form a belief as to the truth of the allegations.

2-4. These paragraphs set forth conclusions of law and not allegations of fact for which an answer is required, but insofar as an answer is required, are denied.

5. Denied.

6. This paragraph sets forth conclusions of law and not allegations of fact for which an answer is required, but insofar as an answer is required, is denied.

7. Denied.

8. Denied.

9. Denied.

10. This paragraph sets forth conclusions of law and not allegations of fact for which an answer is required, but insofar as an answer is required, is denied.

Count II

1-8. Defendants reallege the answers to paragraphs 1-8 of Count I as though fully set forth herein.

9. This paragraph sets forth conclusions of law and not allegations of fact for which an answer is not required; the quotations from section 411(c) of Part B speak for themselves.

10. Denied.

11. Denied.

12. Denied.

13. Denied.

14. Denied.

Count III

1-8. Defendants reallege the answers to paragraphs 1-8 of Count I as though fully set forth herein.

9. Denied.

10. Denied.

11. Denied.

12. Denied.

13. Denied.

Count IV

1-8. Defendants reallege the answers to paragraphs 1-8 of Count I as though fully set forth herein.

9. This paragraph sets forth conclusions of law and not allegations of fact for which an answer is required, but insofar as an answer is required, is denied.

10. Denied.

11. Denied.

12. Denied.

Defendants deny each and every allegation of fact not hereinbefore denied.

Respectfully submitted,

William J. Kilberg Solicitor of Labor	Irving Jaffe Acting Assistant Attorney General
James G. Johnston Associate Solicitor	United States Attorney
Mark E. Solomons	Harland F. Leathers
Frank A. White Attorneys, Department of Labor Co-Counsel for Defendant Peter J. Brennan, Secretary, United States Department of Labor	David Orlikoff Attorneys, Department of Justice Counsel for Defendant Caspar W. Weinberger, Secretary, United States Department of Health, Education and Welfare Co-Counsel for Defendant Peter J. Brennan, Secretary, United States Department of Labor

[Certificate of Service omitted in printing]

Civil Action No. 1761
In The
UNITED STATES DISTRICT COURT
For the Eastern District of Kentucky
at Pikeville

[Title omitted in printing]

Plaintiffs' Motion For Summary Judgment

Plaintiffs Turner Elkhorn Mining Company, *et Al.*, move this Court pursuant to Rule 56 of the Federal Rules of Civil Procedure to:

1. Enter a summary judgment in Plaintiffs' favor for the relief demanded in each of the four counts of Plaintiffs' Complaint on the ground that there is no genuine issue as to any material fact and that Plaintiffs are entitled to a judgment as a matter of law;

or, in the alternative,

2. If summary judgment is not rendered in Plaintiffs' favor upon the whole case or for all the relief asked and a trial is necessary, that the Court, at the hearing on the motion, by examining the pleadings and evidence before it and by interrogating counsel, ascertain what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just.

This motion is based upon:

(a) Defendant Brennan's Answers dated October 30, 1973 to Plaintiffs' First Set of Interrogatories, heretofore filed with the Court;

(b) Defendants' Answers dated January 15, 1974 to Plaintiffs' Second Set of Interrogatories, heretofore filed with the Court;

(c) Defendants' Statement dated January 18, 1974 in Response to Plaintiffs' First Request for Admissions of Fact, heretofore filed with the Court;

(d) Deposition of Nancy Snyder, Director of the Division of Coal Mine Workers' Compensation Programs, Employment Standards Administration, U.S. Department of Labor, dated December 5, 1973, heretofore filed with the Court;

(e) Deposition of George F. Reall, Manager of the National Council on Compensation Insurance, dated January 16, 1974, heretofore filed with the Court;

(f) Affidavit of J. Huell Briscoe dated January 21, 1974, attached hereto;

[*](g) Documents produced by the Defendant Brennan in response to Plaintiffs' Request for Production of Documents pertaining to the claims for benefits under Title IV of the Coal Mine Health and Safety Act of:

William Thompson	Soc. Sec. No. 304-14-3468
Claude Pennington	Soc. Sec. No. 307-03-6192
Cecil Purnell	Soc. Sec. No. 355-09-2809
Andrew Smith	Soc. Sec. No. 303-05-2658

true and complete copies of which are attached hereto.

[*](h) Documents served by the U.S. Department of Labor upon two of the Plaintiffs named herein pertaining to the claims for benefits under Title IV of the Coal Mine Health and Safety Act of

Craig Fulton	Soc. Sec. No. 283-09-7890
Alva A. Libbey	Soc. Sec. No. 354-10-9906

true and complete copies of which are attached hereto.

[Signatures and Certificate of Service omitted in printing]

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[*] Documents omitted in printing.

Civil Action No. 1761

In The
UNITED STATES DISTRICT COURT
For the Eastern District of Kentucky
at Pikeville

[Title omitted in printing]

Affidavit Of J. Huell Briscoe

State Of Illinois
County Of Cook—ss

J. Huell Briscoe, being first duly sworn, deposes and says that if he were called as a witness in the captioned matter, he would testify under oath as follows:

He is a practicing actuary and has been one for 35 years. He is President of J. Huell Briscoe & Associates, Inc., 307 North Michigan Avenue, Chicago, Illinois 60601, a firm of consulting actuaries, and has been a fellow of the Conference of Actuaries in Public Practice and a member of the American Academy of Actuaries since these societies were organized. His actuarial practice has included actuarial studies for casualty insurers, state insurance departments, national and state associations, and nationally known business corporations. His experience includes studies of the frequency and severity of claims under workmen's compensation policies.

He has qualified as an expert witness in insurance matters (including rating procedures) in administrative hearings in several states including Illinois, Kentucky, Pennsylvania, Tennessee, Florida and Louisiana, and in state courts including Illinois and Pennsylvania, and in Federal

courts including the U.S. Court of Claims, and United States Tax Court.

He has examined available data on the frequency and severity of claims to be expected under Part C of Title IV of the Coal Mine Safety Act of 1969, as amended by the Black Lung Act of 1972, and under the similar provisions enacted by states in an effort to comply with the requirements of Part C of that Act, as amended.

His examinations of the available data have been occasioned by (1) his representation as consulting actuary of the Coal Mine Rating Bureau of Pennsylvania and (2) a consulting actuary for Old Republic Insurance Company (the largest insuror of workmen's compensation for coal mine companies in the United States), a relationship that has existed continuously for more than 25 years.

During the course of his analysis, he has consulted and collaborated with the actuarial staff of the National Council on Compensation Insurance.

His research and examination of the available pertinent data have indicated clearly that only two meaningful sources of information exist as to frequency of "Black Lung" claims, or expected claims, for currently employed mine workers. These sources are: (1) the experience under the Pennsylvania Act #337 Coal Mine Occupational Disease, and (2) a study of 62,876 miners by the National Institute of Occupational Safety and Health (NIOSH) under the 1969 Coal Mine Health and Safety Act provisions. Each of these sources of data include information as to age.

His research has further determined that, as to former coal mine workers eligible for additional or new benefits under the July 1, 1973 amendment to the Act, periodic reports from the Social Security Administration of the De-

partment of Health, Education & Welfare are obtainable as to "Black Lung Benefit" claimants.

His research has also determined that as to frequency and severity, the age of the average worker and a claimant are significant as to final financial results and that such age factors are available in each source data except the "Status Reports" from the Social Security Administration Division of the Department of Health, Education and Welfare.

His research also indicates that the "NIOSH" studies are probably not representative as to the older age groups (60-64) wherein respiratory involvement is most prevalent, and that the results reflected therefrom are probably understated as to frequency of expected claims.

He states that in his opinion, the Pennsylvania studies are the most reliable since they reflect actual claims incurred under an Act quite similar to the Federal Act, except as to the amount of benefits.

The Pennsylvania frequency for "Black Lung" claims for the four year period under review amounted to 1.47/100 working miners for the age group under 63, and 29.11/100 for the age group over 63, an overall average of 12.91/100 of working miners.

He states that in his opinion the frequency used by the National Council on Compensation Insurance of 2.57/100 working miners (obtained from the NIOSH studies) is most conservative as to working miners and makes little or no allowance for the vast potential exposure incident to presently disabled miners (136,600 as of April, 1973) filing for medical benefits provided for by the 1972 amendment to the Act.

He states that in his opinion, the present value of Federal Indemnity Benefits computed by the National Council at $56,384.51 per claim is proper. He further states that in his opinion, the present value of medical benefits computed by the National Council at $12,216.00 is based on the latest available information, and is reasonably accurate. In each instance, the present value has been computed on the basis of life expectancy using the U.S. Lives Mortality Table with interest assumed at 3.50%.

He states that in his opinion, the coal mine industry can expect to incur liability under the Federal "Black Lung" Act of at least $279,805,000 per year as to presently employed miners as follows:

Estimated Working Population of Coal Miners		135,000
Frequency		2.57%
Expected Claims		3,469.5
Present Value Per Claim		
Indemnity	$56,334	
Medical	$12,216	$ 68,550
Estimated Pure Claim Cost Incurred Per Year		$237,834,225
Estimated Annual Workmen's Compensation Insurance Cost for Active Miners (Based on an expense loading of 15%)		$279,804,971

He further states that in his opinion, the coal mine industry can expect medical claims from former miners already disabled with a present value of at least $2,236,246,588 as follows:

Former Miners Drawing Benefits at 4/30/73	130,600	
Claims Awaiting Determination at 4/30/73	56,000	
Estimated Additions	25,000	
Estimated Claimants		155,600
Estimated Present Value Per Medical Claim		$12,216
Estimated Pure Medical Claim Cost for Former Miners Recently Disabled		$1,900,809,600
Estimated Workmen's Compensation Insurance Cost (Based on Expense Loading of 15%)		$2,236,246,588

/s/ J. Huell Briscoe

Subscribed And Sworn to before me
this 21st day of January, 1974

/s/ Nancy M. Zorn
Notary Public

Civil Action No. 1761

In The
UNITED STATES DISTRICT COURT
For the Eastern District of Kentucky at Pikeville

[Title omitted in printing]

Affidavit Of George W. Wright

State Of Colorado
County Of Denver—ss

I, George W. Wright, of 460 South Marion Parkway, Denver, Colorado, being first duly sworn, depose and say

that if I should be called to testify as a witness in the above-captioned cause, I would state under oath as follows:

1. I am a physician specializing in pulmonary and occupational diseases, licensed to practice medicine in the states of New York and Ohio. I am a member of the American Association for Thoracic Surgery, the American Thoracic Society, the American Clinical and Climatological Association, and the Industrial Medical Association.

2. I presently am Consultant for Environmental Affairs for Johns-Manville Corporation, Denver, Colorado. From 1953 to 1972, I was Head of the Medical Research Division of Saint Luke's Hospital, Cleveland, Ohio, and Professor of Internal Medicine at Case Western Reserve University, Cleveland, Ohio. From 1960 to the present, I have been Chairman of the Social Security Administration Medical Advisory Committee (Disability); from 1965 to present, a member of the Permanent Commission and International Association on Occupational Health; and from 1969 to 1970 inclusive, a member of the Environmental Health Sciences Training Committee of the National Institute of Environmental Health Sciences of the Department of Health, Education and Welfare.

3. According to the scientifically valid information currently available, coal miners in the United States have experienced the development of two kinds of lung tissue reaction as a result of exposure to dust in coal mines. One of these consists of discreet foci of dust characterized by a proliferative cellular reaction and reticulin deposition with slight to moderate fibrous tissue production, the latter dependent to some degree on the concentration of free crystalline silica co-existing with coal dust. This is the so-called "coal macule". This nodular reaction

is distributed rather evenly throughout both lungs and constitutes "simple coal workers' pneumoconiosis". Some coal miners may also develop a second reaction consisting of masses of large coalescing nodules, or extensive proliferative and hyalin tissue formation. This type of reaction is designated "progressive massive fibrosis" or PMF. These two types of tissue reaction distort the involved or neighboring lung tissue. These anatomical tissue reactions are the only unique or specific development consequent to deposition of coal mine dust, and comprise the anatomical basis for coal workers pneumoconiosis. Progressive massive fibrosis is virtually always preceded and accompanied by the discreet macular or nodular form of simple coal workers pneumoconiosis.

4. The discreet nodular densities that characterize simple coal workers' pneumoconiosis involve so little of the total lung in the pre-x-ray positive stage and also in the ILO or UICC category I stage that abnormalities consequent to lung loss are not measurable and have no disabling effect. In category II and category III of simple coal workers' pneumoconiosis there may be measurable effects of a restrictive nature. Small amounts of progressive massive fibrosis also may actually cause little impairment.

5. The chest roentgenogram is one of the required tools for making a diagnosis of coal workers pneumoconiosis unless the lung can be examined directly by microscope.

6. Chronic bronchitis and emphysema, which are of themselves capable of causing severe disability, are not caused by and do not constitute diseases to be designated as pneumoconiosis.

7. As set forth in Subpart D of Part 410 of Title 20 of the Code of Federal Regulations, "coal workers pneu-

moconiosis, anthracosiliosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis or silicotuberculosis" are disease entities, having specific physical characteristics and known specific causative agents, and are accepted by the scientific world as varieties of the pneumoconiosis. In contrast physical impairments and physical conditions such as cardiac enlargement or enlargement of the left ventricle are the result of many diseases having nothing to do with the pneumoconioses. Such impairments or conditions therefore are not acceptable as diagnostic criteria of specific diseases and cannot be substituted for the proper diagnostic criteria of the diseases classed under "pneumoconiosis" as the scientific world understands and uses that term. For example, arteriosclerosis or systemic hypertension are the common diseases causing left ventricle hypertrophy while none of the pneumoconioses cause this condition.

Signed: George W. Wright

Subscribed and sworn to before me
this 22nd day of February, 1974
at Denver, Colorado,
Arapahoe County.

(Notarial Seal)

/s/ George M. Mollick
Notary Public

My Commission expires August 20, 1977

Civil Action No. 1761

In The
UNITED STATES DISTRICT COURT
For the Eastern District of Kentucky
at Pikeville

[Title omitted in printing]

Motion To Strike Affidavits And Other Documents In Support Of Plaintiffs' Motion For Summary Judgment

Defendants move the Court to strike defendant's answers to plaintiffs' first set of interrogatories directed to defendant Brennan, dated October 30, 1973, defendants' answers to plaintiffs' second set of interrogatories, dated January 15, 1974, defendants' statement in response to plaintiffs' first request for admissions of fact, dated January 18, 1974, deposition of Nancy Snyder, dated December 5, 1973, deposition of George F. Reall, dated January 16, 1974, affidavit of J. Huell Briscoe, dated January 21, 1974, all documents produced by defendant Brennan in response to plaintiffs' first request for production of documents pertaining to the claims of the following individuals: William Thompson, Claude Pennington, Cecil Purnell and Andrew Smith, all documents served upon two of the plaintiffs to this action by defendant Brennan pertaining to the claims of the following individuals: Craig Fulton and Alva A. Libbey, a document entitled "Coal Mine Compensation Bureau of Pennsylvania, Analysis of Exposure Under Pennsylvania Act 337, Coal Mine Occupational Disease," prepared by J. Huell Briscoe & Associates, Inc., dated May 29, 1973, a document entitled "Projected Direct Impact of Black Lung Program on Kentucky With Emphasis on

the Kentucky Coal Industry: a Preliminary Report," prepared by the University of Kentucky College of Business and Economics, dated July 9, 1973, Testimony of Kentucky Labor Commissioner James R. Yocom for Delivery to the General Subcommittee on Labor, U.S. House of Representatives, dated July 11, 1973, attached to and in support of plaintiffs' motion for summary judgment, and any further documents which plaintiffs may seek to introduce in support of their motion for summary judgment, including the affidavit of George W. Wright, M.D., dated February 22, 1974, which go beyond the legislative record compiled in conjunction with the enactment of the Federal Coal Mine Health and Safety Act of 1969, as amended, on the ground that all such extraneous material is immaterial and inadmissible in evidence in contravention of the requirements of Rule 56(e), Federal Rules of Civil Procedure.

[Signatures and Certificate of Service omitted in printing]

Civil Action No. 1761

In The
UNITED STATES DISTRICT COURT
For the Eastern District of Kentucky
at Pikeville

[Title omitted in printing]

Motion To Dismiss And Cross-Motion For Summary Judgment

Defendants Peter J. Brennan, Secretary of Labor and Caspar W. Weinberger, Secretary of Health, Education and Welfare, by their undersigned attorneys, hereby respectfully move the Court, pursuant to Rule 12 of the Federal Rules of Civil Procedure, to dismiss this action on the ground that the complaint fails to state a claim upon which relief may be granted.

Alternatively, defendants cross-move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment on the grounds that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law. In support of these alternative motions, the Court is respectfully referred to the brief filed herewith and the decision of the three-judge court in *National Independent Coal Operator's Association, et al.* v. *Brennan*, Civil Action No. 1711-73 (D.D.C. February 21, 1974), a certified copy of which is attached hereto.

[Signatures, Attachment to Motion, and Certificate of Service omitted in printing]

Affidavit Of Nancy Snyder

Washington, District of Columbia

I depose and say that:

I am Mrs. Nancy Snyder. Since July 1, 1973, I have been the duly appointed Director of the Division of Coal Mine Workers' Compensation (DCMWC) of the Employment Standards Administration, United States Department of Labor. In my capacity as Director of the DCMWC, it is my responsibility to administer the regulations of the Secretary of Labor promulgated for the purpose of carrying out the statutory command of section 415 of Part B and Part C of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. Among the functions of the DCMWC are to prepare, process, adjudicate, and in

respect of certain approved claims, pay benefits in respect of persons qualifying for black lung benefits under section 415 and Part C of the Act. In addition, it is my responsibility to guarantee that operators adjudicated liable for the payment of benefits in respect of any case are fully informed of their potential responsibility prior to adjudication, and are given an opportunity to participate meaningfully in all adjudicatory proceedings affecting such operator. Other responsibilities include budget, monitoring, staffing and other administrative functions which must be performed to assure efficient and continued operation of the program.

As of March 2, 1974, the Social Security Administration has received 547,900 miners' and survivors' claims. Of these more than 24,000 claims are survivors' claims filed on or after July 1, 1973. As of March 2, 1974, 352,000 claims have been approved by the Social Security Administration and an estimated 484,600 persons are receiving Federal lifetime black lung benefits under Part B of Title IV. The Social Security Administration is currently processing approximately 6,000 claims and will continue to accept and process all survivors' claims filed before January 1, 1974, or within 6 months from the date of death of the miner, whichever is later. The total cumulative payout by the Social Security Administration as of March 2, 1974, in respect of all prior approved claims is $2,331,080,000. It is estimated that the total payout by the Social Security Administration, for all approved claims in calendar year 1973 was $1,076,000,000.

As of March 31, 1974, the DCMWC has received 26,075 claims of living miners and is currently accumulating evidence and processing each of these claims. As of the above date, 536 "refiled" claims have been received and none of

those has thus far been approved nor has any coal operator been determined potentially liable for payment of medical benefits in respect of any such claim. It should be noted that all "refiled" claims are treated as new section 415 or Part C claims and are processed accordingly. Any prior evidence submitted to the Social Security Administration with respect to such claims is admissible in evidence but is not conclusive as to eligibility, either medical or otherwise.

As of March 31, 1974, 44 coal operators have thus far been designated authorized to self-insure under section 423 of the Act. There have been 1,774 certificates of purchase of commercial Part C black lung insurance received from coal operator's insurance carriers and State Workmen's Compensation funds. It is my understanding that no coal operator in any State will be denied commercial insurance or State fund coverage upon payment of the prescribed premium. It is also my understanding that the Federal Coal Mine Health and Safety Act endorsement appearing, described, and interpreted in 20 CFR 726.203 of the Secretary's regulations is currently being attached to all policies of compensation insurance sold where coverage for liability under the provision of Part C of Title IV of the Act is desired.

DCMWC currently employs 97 persons all of whom are situated in Washington, D.C. Among these persons are claim examiners, technical, advisory, administrative, and clerical staffs. Plans are currently progressing to increase the full staff to 151 persons by early 1974. To date, the Division has entered into contracts and agreements with 676 physicians and medical testing and treatment facilities to insure that (1) each claimant will have adequate medical facilities available to assist him in developing the medical evidence needed to support a claim and (2) to insure that medical treatment benefits will be available to totally

disabled miners beginning on January 1, 1974. It is informally estimated that the largest number of claims will be filed with DCMWC during fiscal year 1974. Thereafter it is anticipated that the claims load will decrease yearly to an average of between 5-7,000 claims per annum during and after fiscal year 1977.

The procedures by which coal operator liability is assessed with respect to any and all claims for which an operator may be found liable is that which is fully outlined in the duly promulgated regulations of the Secretary. Each potentially responsible operator is notified of the initial determination that a claim is pending for which he may be found liable. Such notification includes a copy of the claimant's claim form and all supporting evidence submitted, including all pertinent medical evidence, upon which the claimant's eligibility and the operator's liability may be predicated. Each operator is notified of and given an opportunity to participate in each and every stage of the ensuing adjudicatory proceedings, if any. In addition each operator is given the right to have any miner-claimant reexamined by a physician of such operator's choosing, if such examination is reasonably warranted. Any and all reliable and probative evidence may be submitted by a potentially liable operator with respect to any claim for which he may be found liable.

As of March 31, 1974, the DCMWC has initially determined 1,041 claims under section 415 and Part C of Title IV of the Act and the applicable regulations. Of these 206 claimants have been initially determined eligible to receive benefits either from a coal operator or from the Federal Treasury. 835 of these claimants have been initially denied benefits.

It is the policy and intent of the DCMWC and of the Secretary of Labor in administering section 415 and Part

C of Title IV of the Act to, as fully and fairly as is practicable and permissible within the law, carry out the clear congressional mandate that all coal miners who have become totally disabled by black lung and the survivors of all coal miners who have died due to or while totally disabled by black lung receive the full measure of benefits provided for them by the Act from whatever source is appropriate. It is also the policy of the DMCWC and the Secretary of Labor to fully insure, within the language and intent of the Act, that all coal operators who may be found liable for the payment of Part C black lung benefits will be treated fairly and reasonably and will be afforded the full range of rights and remedies provided for such operators by the Constitution and laws of the United States.

Affiant states that to the best of her knowledge and belief the foregoing statements are true and correct.

Dated and Signed This 5th Day of April, 1974.

/s/ Nancy Snyder

[Notarization omitted in printing]

Memorandum Opinion And Judgment Order Of The United States District Court For The Eastern District Of Kentucky At Pikeville In Civil Action No. 1761

(These documents are printed at pp. 1A-13A and pp. 14A-15A, respectively, of the Jurisdictional Statement filed in Case No. 74-1302).

Defendants' Motion To Amend Judgment, Filed In The United States District Court For The Eastern District Of Kentucky At Pikeville In Civil Action No. 1761

(This document is printed at pp. 16A-17A of the Jurisdictional Statement filed in Case No. 74-1302.)

Order Of The United States District Court For The Eastern District Of Kentucky At Pikeville In Civil Action No. 1761 Overruling Defendants' Motion To Amend Judgment

(This document is printed at pp. 29A-30A of the Jurisdictional Statement filed in Case No. 74-1302.)

SUPREME COURT OF THE UNITED STATES

Nos. 74-1302 and 74-1316

John T. Dunlop, Secretary of the United States Department of Labor, et al.,

Appellants,

v.

Turner Elkhorn Mining Company, et al.; and

Turner Elkhorn Mining Company, et al.

Appellants,

v.

John T. Dunlop, Secretary of the United States Department of Labor, et al.

APPEALS from the United States District Court for the Eastern District of Kentucky.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument.

June 9, 1975

A true copy Michael Rodak, Jr.

Teste:

Clerk of the Supreme Court of the United States

By /s/ Francis J. Corson

Deputy

Supreme Court, U. S.
FILED
MAY 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1302

JOHN T. DUNLOP, SECRETARY OF LABOR, and CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Appellants,

vs.

TURNER ELKHORN MINING CO., ET AL.,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Kentucky

MOTION TO AFFIRM

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IN THE

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JOHN T. DUNLOP, SECRETARY OF LABOR, and CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Appellants,

VS.

TURNER ELKHORN MINING CO., ET AL.,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Kentucky

MOTION TO AFFIRM

Pursuant to Rule 16 (1)(c) of the Rules of this Court, appellees move to affirm Paragraphs (1) and (2) of the judgment order of the District Court. (J.S. App. B).

STATEMENT

This appeal arises out of an action brought by appellees in the District Court for the Eastern District of Kentucky

to enjoin the implementation and enforcement of Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. §§901, *et seq.*, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150. Appellees have appealed to this Court from portions of the judgment below which are adverse to them (No. 74-1316, Jurisdictional Statement filed April 18, 1975). The instant appeal has been taken by the Secretaries of Labor and Health, Education and Welfare from the District Court's ruling that two sections of the legislation in question are inconsistent with the Act's intent and purpose, and violate rights guaranteed appellees by the Due Process Clause of the Fifth Amendment of the Federal Constitution.

In Title IV of the Coal Mine Health and Safety Act (hereafter, "Title IV") Congress has created a workmen's compensation program under which benefits are payable to present and former coal mine workers who are totally disabled by a single occupational disease known as coal workers' pneumoconiosis, or to the survivors of deceased mine workers who were totally disabled by the disease at the times of their deaths. Act, §401, 30 USC §901. Contrary to what the appellants would have this Court believe (See J.S. pp. 6-7), benefits are not payable under Title IV for disability arising from other respirable diseases, or from what might be considered sequelae of coal workers' pneumoconiosis. Neither is it true that Congress employed the term "total disability" in Title IV as "legislative shorthand" to express an intention to compensate mine workers who were not totally disabled within the meaning of the Act, as the appellants also would have this Court believe. (See J.S. pp. 16-17).

1. Legislative history leaves no doubt that Congress intended that compensation only be paid for disability

caused by the occupational disease known as coal workers' pneumoconiosis, which is defined in Title IV as ". . . a chronic dust disease of the lung arising out of employment in a coal mine." Act, §402(b), 30 USC §902(b). In 1971, it was proposed that Title IV be amended to cover disability from any respiratory or pulmonary disease or impairments and their sequelae arising out of employment in a coal mine.[1] Congress was aware that mine workers, along with some 25% of the adult males in the general population of the nation, were likely to suffer from, and be disabled by, nonwork-related pulmonary diseases such as chronic bronchitis and emphysema;[2] and there was substantial evidence before it showing it to be the overwhelming consensus of expert medical opinion that coal workers' pneumoconiosis was the only respirable disease for which there was an established occupational relationship.[3] The proposal to broaden the law was not enacted.

2. Appellants' assertion that Congress intended to compensate certain claimants regardless of their present ability to work (See J.S. p. 17) is belied by legislative history and the language of Title IV itself. Under Title IV as originally enacted, a mine worker was considered totally disabled if he was unable, by reason of pneumoconiosis, to engage in any substantial gainful activity. In 1972, over the appellants' objections, Congress broadened the defini-

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1 Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, 92nd Cong., 1st & 2nd Sess., *Hearings on S. 2675, S. 2289, H.R. 9212*, 1-21 (Hereafter, *1972 Senate Hearings*).

2 *1972 Senate Hearings, supra* n. 1 at 381.

3 See, *e.g., 1972 Senate Hearings, supra* n. 1. at 375-85, 409, 442-50, 465-68, 552.

tion of "total disability" to cover claimants who, because of the disease, cannot or could not find comparable work suitable to their skills and abilities.[4] Congress did not, however, abandon the requirement that physical disability caused by the disease must be shown in order to qualify for benefits. The amended definition of "total disability" provides that:

> ". . . a miner shall be considered totally disabled when *pneumoconiosis prevents him* from engaging in gainful employment requiring skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time. Act, §402(d), 30 USC §902(d). (Emphasis supplied)

3. The portions of Title IV declared unconstitutional by the District Court pertain to and govern the evidentiary determination of whether a claimant is totally disabled by coal workers' pneumoconiosis. Section 411(c)(3), 30 USC §921(c)(3), raises an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis (or that his death was caused by the disease, or that he was totally disabled by it at the time of death from other causes), if it is established that he is suffering or suffered from a chronic dust disease of the lung. . .

> . . . which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to

[4] *1972 Senate Hearings, supra,* n. 1 at 28-29, 567.

> yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B). . . .

Section 411(c)(4), 30 USC §921(c)(4), raises a rebuttable presumption that a miner is totally disabled by the disease (or died of it, or was totally disabled by it when he died) if he was employed for fifteen years or more in mining and, in the absence of x-ray evidence of the disease, "other evidence" demonstrates the existence of a totally disabling respiratory or pulmonary impairment. The section further provides that this presumption may only be rebutted by proof that the miner does not or did not have the disease at all, or that if he suffers or suffered from a respiratory or pulmonary impairment, that it did not arise out of coal mine employment.

ARGUMENT

1. The correctness of the District Court's conclusion that the evidentiary limitations in question are unconstitutionally arbitrary and unreasonable is manifest, and should be affirmed by this Court without further consideration. The provisions of Title IV struck down by the Court are classic examples of a legislative attempt to enact into existence facts that do not exist in actuality, by compelling, in the case of the irrebuttable presumption in Section 411(c)(3), inference of a fact from proof of another when there is no rational connection between them, and, in the case of the rebuttable presumption in Section 411(c)(4), by unfairly limiting the opportunity to disprove the fact presumed. This Court and others have condemned such legislation as repugnant to the requirements of constitutional due process of law. See: *Cleveland Bd. of Ed.* v. *LaFleur*, 414 U.S. 632, 644 (1974); *U.S. Dept. of Agriculture* v. *Murry*, 413 U.S. 508, 514 (1973); *Vlandis* v. *Kline*, 412 U.S. 441, 446 (1973); *Stanley* v. *Illinois*, 405 U.S. 645, 657 (1972); *Leary* v. *United States*, 395 U.S. 6, 31 (1969); *Tot* v. *United States*, 319 U.S. 463, 467 (1943); *Heiner* v. *Donnan*, 285 U.S. 312, 325 (1932); *Schlesinger* v. *Wisconsin*, 270 U.S. 230, 239-40 (1926). See also, *Andrews* v. *Drew Mun. Sch. Dist.*, 507 F. 2d 611, 614 (5th Cir. 1975); *Owens* v. *Roberts*, 377 F.Supp. 45, 52 (M.D. Fla. 1974); *Juster Bros.* v. *Cristgau*, 7 N.W.2d 501, 507 (Minn. 1943); *Carolene Milk Products Co.* v. *McLaughlin*, 5 N.E.2d 447, 450 (Ill. 1936). Congress has said in Title IV that in order for a miner to be entitled to benefits it must be determined that pneumoconiosis prevents him from engaging in gainful employment comparable to that in which he has engaged in the past, but the irrebuttable presumption of Section 411(c)(3) nevertheless bars mine operators from presenting evidence to show that a claimant is not disabled in that sense. Similarly, a mine operator may not rebut the presumption of Section 411(c)(4) by producing evidence that a claimant is or could be engaged in such employment, he must prove that the claimant does not or did not have the disease at all, or that any breathing impairment he does or did have is not associated with mine work. The District Court recognized that the limitations placed upon an operator's opportunity to prove that a claimant is not totally disabled within the meaning of the Act constitute ". . . a departure from the overall pattern of the Act which makes the existence of both the disease and disability two separate factors which must be established before liability is imposed" (J.S. App. A p. 9A, and see p. 11A), and properly concluded that these provisions were arbitrary and unreasonable.

2. Appellees have no quarrel with the proposition, advanced at pages 14-16 of the government's Jurisdictional Statement, that Congress possesses a broad authority under the Commerce Clause to legislate in the interests of the welfare of mine workers, but such enactments, like any other legislation, must comport with the requirements of due process of law, and are not immune to judicial scrutiny of the rationality of the means employed to achieve their ends, however legitimate those ends might be. What is more to the point—as the legislative history discussed at the outset of this motion shows—Congress did not intend for the compensation program created by Title IV to have the meaning ascribed to it in the tortured

analysis found at pages 16-19 of the government's Jurisdictional Statement. Appellants are merely asking this Court to assume the role of the legislature and rewrite Title IV (from what they would have the Court believe to be the "shorthand" notes of Congress) in a form that they hope would cure the irrationality of the provisions declared unconstitutional by the District Court.

3. This Court's summary affirmance of the decision of the District Court for the District of Columbia in *National Independent Coal Operators Association* v. *Brennan,* 372 F. Supp. 16 (hereafter, "the NICOA case"), does not foreclose consideration of appellees' motion to affirm, nor would it by any means support summary reversal of the decision in the instant case, as suggested by the appellants. (J.S. p. 21). Appellants' assertion that the *NICOA* case involved a challenge to substantially all the provisions of Title IV, their assertion that "the complaint aileged that the Act was a taking of property without just compensation, was a retroactive impairment of contracts and deprived the mine operators of due process of law," and their assertion that the District Court upheld the constitutionality of the Act (J.S. p. 9), seriously misrepresent the nature of that case, its holdings, and its precedential value.

The *NICOA* case was not even brought to challenge the constitutionality of Title IV, it was brought to challenge the validity of the regulations issued by the Secretary of Labor under the law, and the plaintiffs did not seek convocation of a three judge court. Their prayer for relief was that the court:

> "Declare that the aforesaid regulations and standards adopted by the Secretary of Labor for determining eligibility of miners and their dependents for black lung benefits under Part C of Title IV of the Act, for determining the responsible operator obligated to assure payment of such benefits, and requiring plaintiffs to provide medical benefits to miners receiving black lung benefits under Part B of Title IV of the Act, are contrary to the intent and purpose of the statute, and in their operation and effect will abridge substantive rights guaranteed to plaintiffs by the Constitution and laws of the United States, and will deny plaintiffs and other coal mine operators of their property without due process of law."

A three judge court was convened on the government's motion, apparently because one paragraph of the 21-paragraph, 17-page complaint read:

> 20. In the alternative, if the regulations and standards of the Secretary as hereinabove described are in fact within the authorization and intent of the Act, and the Act was intended to authorize imposition of liability upon plaintiffs for payment of black lung benefit payments, retrospectively for periods prior to the effective date of the Act, and on the basis of presumptions as to the fact of disability and causal relationship, the Act is to that extent unconstitutional and void and is in violation of the due process and equal protection guarantees of the Fifth Amendment of the Constitution of the United States.

The "opinion" of the District Court in the *NICOA* case consists merely of bare findings of fact and conclusions of law, unilluminated by a reasoned elaboration of the grounds of decision or citation of authority. The *NICOA* Court's statement that "Congress had the constitutional power to enact Title IV of the Act", is merely a jurisdictional finding preliminary to the Court's findings on the merits. 372 F. Supp. at 23. A holding that Congress had the constitutional *power* to enact the legislation in question

says nothing of the crucial issue in the present case, which is whether Congress has used that power in a way consistent with the Constitution. The only holding of the *NICOA* case that touches upon the evidentiary limitations in question here is to be found in the District Court's Conclusion No. 8 (372 F. Supp. at 25) which is patently a *non sequitur*:

> Pursuant to Sections 422(h) and 422(f)(2) of the Act, the Secretary of Labor properly promulgated regulations applying the Section 411 presumptions to Section 422 operator liability. Therefore, the statutory provisions pursuant to which the Secretary's regulations were promulgated do not and will not deprive the plaintiffs in No. 1711-73 of their property without due process of law or deny them equal protection of the law.

The District Court in the instant case was well aware of the *NICOA* decision and its inapplicability to the issues before it. (J.S. App. A p. 12A n. 5.)

The appellants' contention that the *NICOA* decision is a meaningful precedent upon which the issues in the instant appeal (as well as the cross-appeal in No. 74-1316) may be resolved, is technical fiction, and this Court should not be misled by it. Appellees respectfully submit that this Court, in its discretion, should consider its summary affirmance of the *NICOA* case as having little precedential value in the circumstances of the instant case. See the majority opinion in *Fusari* v. *Steinberg*, ... U.S. ....., 95 S. Ct. 533, 539 n. 15, and the concurring opinion of Burger, C. J., 95 S. Ct. at 540-541 (1975); and *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the First and Second Paragraphs of the judgment of the District Court should be affirmed.

Respectfully submitted,

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May, 1975

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Nos. 74-1302 and 74-1316

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN T. DUNLOP, SECRETARY OF LABOR, AND F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANTS

v.

TURNER ELKHORN MINING COMPANY, ET AL.

TURNER ELKHORN MINING COMPANY, ET AL. APPELLANTS

v.

JOHN T. DUNLOP, SECRETARY OF LABOR, AND F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

BRIEF FOR THE FEDERAL PARTIES

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1302

JOHN T. DUNLOP, SECRETARY OF LABOR, AND F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANTS

v.

TURNER ELKHORN MINING COMPANY, ET AL.,

No. 74-1316

TURNER ELKHORN MINING COMPANY, ET AL., APPELLANTS

v.

JOHN T. DUNLOP, SECRETARY OF LABOR, AND F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

BRIEF FOR THE FEDERAL PARTIES

OPINION BELOW

The opinion of the district court (J. S. 1A-13A) is reported at 385 F. Supp. 424.[1]

JURISDICTION

The judgment of the district court was entered on November 20, 1974 (J.S. 14A-15A).

The federal parties filed a motion to amend the judgment (J.S. 16A-17A) on December 2, 1974, which was denied on December 18, 1974 (J.S. 29A-30A).[2] They filed their notice of appeal to this Court on January 16, 1975 (J.S. 31A). By order of March 10, 1975, Mr. Justice Stewart extended the time for docketing the appeal to and including April 16, 1975, and it was docketed on that date.

The plaintiffs filed a notice of appeal to this Court on January 20, 1975 (J.S. No. 74-1316, 1c-3c). By order of March 10, 1975, Mr. Justice Stewart extended the time for docketing the appeal to and including April 19, 1975, and it was docketed on April 18, 1975.

This Court noted probable jurisdiction in both cases on June 9, 1975, and consolidated them for review (A. 46). The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

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[1] "J.S." refers to the Jurisdictional Statement in No. 74-1302.

[2] "Federal parties" refers to the appellants in No. 74-1302 and the appellees in No. 74-1316. "Plaintiffs" refers collectively to the private parties, appellants in No. 74-1316 and appellees in No. 74-1302.

QUESTIONS PRESENTED

No. 74-1302

1. Whether Section 411(c)(3) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. (Supp. III) 921(c)(3), which provides for compensation to miners with complicated pneumoconiosis whether or not the miner is functionally disabled, is consistent with the Constitution.

2. Whether Congress, which created in Section 411(c)(4) of the Act, as amended, 30 U.S.C. (Supp. III) 921(c)(4), a presumption that a miner who has worked 15 or more years in coal mines and who has a totally disabling respiratory or pulmonary impairment is totally disabled due to pneumoconiosis, violated the Constitution by providing that the presumption may be rebutted only by evidence that the miner did not have pneumoconiosis, or that the impairment did not arise out of employment in a coal mine.

No. 74-1316

1. Whether the provisions of the Act requiring coal mine operators to pay benefits to their former employees (or their survivors) in connection with occupational disease caused by employment prior to its enactment are unconstitutional.

2. Whether the Act is unconstitutional because it contains eligibility criteria and presumptions that require benefits to be paid to claimants suffering from nonwork-related diseases, claimants whose dis-

eases may not be work-related, and claimants who are not totally disabled.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article I, Section 8 of the Constitution provides in relevant part:

> The Congress shall have Power * * *
>
> * * * * *
>
> To regulate Commerce * * * among the several States * * *
>
> * * * * *
>
> To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, * * *.

2. The Fifth Amendment to the Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

3. The relevant portions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792 (30 U.S.C. 901 *et seq.*), as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150 (Supp. III), are set out in the Appendix to plaintiffs' brief at 1a-9a.

STATEMENT

Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by

the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U.S.C. 901 *et seq.* (the Act), provides for the payment of benefits to coal miners suffering from pneumoconiosis, and to survivors of miners who have died from the disease or while totally disabled by it. Under Title IV, coal mine operators are liable for the payment of certain benefits to miners they have employed. 30 U.S.C. 932.

A. The Statutory Program

1. Coal miner's pneumoconiosis, or black lung disease, is a chronic respiratory ailment caused by the long-term inhalation of coal dust, which causes scarring and degeneration of lung tissue. There is no cure for the disease, which is irreversible. Although, in its earlier stages, pneumoconiosis may not prevent an individual from engaging in employment, it eventually limits severely the capacity of the lungs and their ability to fight infection, and produces total disability and death. The disease also makes the individual more susceptible to emphysema, heart disease, lung cancer, tuberculosis, chronic bronchitis and other diseases, and so can produce death indirectly.[3] Because black lung is a progressive disease, its symptoms may not appear until long after exposure to the coal dust. By the time it is detected and diagnosed, the employment that caused the disease may long since have ceased.

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[3] Hearings on S. 355, S. 467, *et al.* (Coal Mine Health and Safety) before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess., Part 3, A20-28 (1969) (hereafter 1969 Senate Hearings).

As the Surgeon General of the United States testified,[4] pneumoconiosis was recognized as a disease in Great Britain by 1943, and in this country in the 1950s. Studies spanning 1959-1961 and 1963-1965 confirmed its prevalence among coal miners. In the 1969 hearings, the Surgeon General estimated that the disease affected at least 100,000 of the nation's active and inactive coal miners. One out of ten active miners and one out of five inactive miners suffer from the disease.[5] These figures may understate the problem; doctors familiar with the disease estimate that half of all miners eventually become disabled by it.[6] In one study involving one thousand autopsies of miners in Beckley, West Virginia, 85 percent were afflicted with the lung lesions and fibrosis characteristic of pneumoconiosis.[7] Coal miners die from respiratory diseases five times more often than do members of the general population.[8]

The dimensions of the problem are also illustrated by the number of successful claimants under the Act. 547,000 claims were filed under the federally-funded portion of the Act (see p. 9, *infra*), and the Social Security Administration allowed the claims of 482,000 miners and dependents (Department of Health, Education, and Welfare, Fourth Annual Report to Congress on the Administration of Part B of Title IV of the Federal Coal Mine Health and Safety Act of 1969, p. 5 (1975)).

[4] 1969 Senate Hearings, *supra*, n. 3, Part 2, at 719.

[5] 1969 Senate Hearings, *supra*, n. 3, Part 2, at 720-730.

[6] 1969 Senate Hearings, *supra*, n. 3, Part 2, at 641.

[7] *Ibid.*

[8] 1969 Senate Hearings, *supra*, n. 3, Part 3, at 1342.

2. Congress found that state workers' compensation laws did not provide adequate coverage for black lung disease, particularly in cases where miners had ceased working before the disease became manifest.[9] In some States the time provided for claiming benefits expired before the symptoms alerted a victim that he had the disease. Other States did not provide coverage for occupational disease. Still others provided payments inadequate to compensate the miner.

In order to prevent the occurrence of black lung disease and ameliorate its consequences, Congress included in the Act two basic measures. First, Title II of the Act set a limit on the amount of dust that could be present in the ambient air of coal mines. 30 U.S.C. 842. Cf. 30 U.S.C. 841(b).[10] Second, the Act provides that compensation shall be paid to all coal miners who are "totally disabled" by pneumoconiosis arising out of employment in coal mines, and

[9] 30 U.S.C. (Supp. III) 901; H.R. Rep. No. 91-563, 91st Cong., 1st Sess. 13 (1969). House and Senate Debates are reprinted, along with the House, Senate and Conference Reports, in a Committee Print, Legislative History, Federal Coal Mine Health and Safety Act, House Committee on Education and Labor, 91st Cong., 2d Sess. (1970) (hereafter cited as Leg. His.). See Leg. His. at 328.

[10] See generally H.R. Rep. No. 91-563, *supra*, n. 9, at 14-20, 40-42; S. Rep. No. 91-411, 91st Cong., 1st Sess. 7-8, 14-21 (1969).

to the surviving dependents of coal miners whose death was due to the disease. Through a series of definitions, presumptions, and methods of refutation contained in Title IV, the Act provides that any miner suffering from "complicated" pneumoconiosis—the last and terminal stage of the disease—receives this compensation whether or not he is able to engage in alternative work, whereas miners with less-advanced black lung receive compensation only if physically disabled by the disease. Because pneumoconiosis shares many of the attributes of other respiratory and pulmonary diseases, the disease is defined in general and symptomatic terms. If the symptoms are present in long-time miners, the disease is presumed to be present, subject to refutation if a mine operator can demonstrate that the disease is not pneumoconiosis, or that the afflicted individual could not have acquired such a disease as a result of exposure to dust in its mines.

3. The Act divides the financial responsibility for the payment of benefits into three components. The first component is contained in Part B of Title IV of the Act. Claims filed between December 30, 1969 (the date of enactment) and June 30, 1973, are adjudicated by the Secretary of Health, Education and Welfare, and paid by the Social Security Administration (30 U.S.C. (1970 ed. and Supp. III) 921-924).[11]

[11] Pursuant to 30 U.S.C. (Supp. III) 924, certain survivors' claims filed prior to January 1, 1974, also are the responsibility of the Social Security Administration.

The Part B program is paid for out of the general revenues of the United States.

The second component is established by Section 415 of the Act (30 U.S.C. (Supp. III) 925). Claims filed between July 1 and December 31, 1973, are adjudicated and paid by the Secretary of Labor. Federal payments to these claimants terminated on December 31, 1973, and the claimant's coal mine employer assumed responsibility to make continuing payments (see description of Part C, *infra*). Coal mine operators were notified of the pendency of a Section 415 claim for which they may later have become liable and have been afforded an opportunity to participate in the adjudication of those claims.

Part C, the third component of Title IV (30 U.S.C. (Supp. III) 931-941), provides that claims filed after December 31, 1973, shall be processed under an approved state workers' compensation law. If the claimant's State does not have a black lung compensation law approved by the Secretary of Labor, the claim is filed with the Secretary of Labor. The coal industry bears the primary responsibility for payment of claims under Part C. Preliminary payments, pending adjudication, are made by the Secretary of Labor, but any coal mine operator finally determined to be responsible must reimburse the Secretary and becomes responsible for payment of future benefits.

Part C provides that employers will be liable for all claims filed through 1981.[12] Because the Act contains

[12] Section 422(e)(3), 30 U.S.C. (Supp. III) 932(e)(3).

a three-year statute of limitations, employers are responsible only for pneumoconiosis discovered after the initial passage of the Act in 1969. Section 422(f)(1), 30 U.S.C. (Supp. III) 932 (f)(1).[13] Claimants who qualify for benefits receive these benefits for as long as they continue to meet the statutory criteria; because pneumoconiosis is progressive and irreversible, almost all claimants will receive benefits for the rest of their lives, or until the statutory program expires.[14] If a miner dies because of pneumoconiosis his survivors are entitled to benefits.[15]

Claims filed under Section 415 or Part C are adjudicated by means of the procedures provided for in

[13] But see Section 415, 30 U.S.C. (Supp. III) 925, governing the six-month transitional period. The Department of Labor has taken the position that no statute of limitations applies to claims filed during that period.

[14] Benefits are paid at a rate equal to 50 percent of the minimum monthly payment to which a disabled federal employee in grade GS-2 would be entitled. See 30 U.S.C. 922(a)(1). That sum is currently $187.40 per month. These benefits are increased if the claimant has dependents; the maximum increase is 100 percent if the claimant has three or more dependents (30 U.S.C. (Supp. III) 922(a)(3)). The benefits are reduced, as provided by 30 U.S.C. (Supp. III) 922 (b) and 932(g), to account for some alternative sources of income. Mine operators also are responsible for claimants' medical expenses. See 20 C.F.R. 720.109(a), 725.102(a).

[15] 30 U.S.C. 922(a)(2); (Supp. III) 922(a)(3) to (a)(6). For purposes of simplicity, claims by miners or by their survivors are referred to generically in this brief as miners' claims for compensation.

the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1435, 1436, as amended, 33 U.S.C. (Supp. III) 919 and 921.[16] Claimants and mine operators are entitled to a hearing conducted in accordance with the provisions of the Administrative Procedure Act (5 U.S.C. 554), to appeal to an independent Benefits Review Board, and to review by a United States court of appeals.[17]

B. Prior Judicial Proceedings

An association of mine operators brought suit challenging substantially all of the provisions of Title IV of the Act and the Secretary of Labor's implementing regulations. The complaint alleged that the regulations were unauthorized by the Act and that, if the regulations were authorized, then the Act is a taking of property without just compensation, is a retroactive impairment of contracts, and deprives the mine operators of due process of law. A three-judge district court in the District of Columbia upheld each of the challenged provisions of the Act, and this Court summarily affirmed. *National Independent Coal Operator's Association* v. *Brennan*, 372 F. Supp. 16 (D. D.C.), affirmed, 419 U.S. 955. Faced with a direct assault on the constitutionality of all major provisions of Title IV, the district court held (372 F. Supp. at

[16] Sections 415(a) and 422(a), 30 U.S.C. (Supp. III) 925 (a), 932(a).

[17] 33 U.S.C. (Supp. III) 921.

23): "Congress had the constitutional power to enact Title IV of the Act." Appellants' Jurisdictional Statement in that case (No. 73-1902) contended that the Act retroactively impairs contracts and that presumptions and limitations on rebuttal evidence contained in Title IV are irrational and unconstitutional (J.S. No. 73-1902 at 13-15); this Court rejected those contentions by summarily affirming. See *Fusari* v. *Steinberg*, 419 U.S. 379, 391-392 (Burger, C.J., concurring).

C. The Instant Suit And The District Court's Decision

The suit here was brought by 22 coal mine operators against the Secretary of Labor and the Secretary of Health, Education and Welfare. Plaintiffs sought declaratory and injunctive relief from the operation of numerous portions of Title IV, alleging violation of their rights under the Fifth Amendment. A three-judge district court was convened pursuant to 28 U.S.C. 2282 and 2284. The court deferred consideration of the case until this Court had acted in *National Independent Coal Operator's, supra.* Then, upon cross-motions for summary judgment, the district court upheld most of the challenged statutory provisions, but ruled that "the irrebuttable presumption set forth in 30 U.S.C. 921(c)(3) and the limitation of evidence necessary to rebut the presumption created in 30 U.S.C. 921(c)(4) are violative of the United States Constitution" (J.S. 14A-15A).

1. Section 411(c)(3) of the Act, 30 U.S.C. (Supp. III) 921(c)(3), provides that "if a miner is suffering or suffered from a chronic dust disease of the lung," shown by x-rays, by a biopsy, or by similar techniques to be characterized by massive lesions of the lung, "then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis * * *." The district court concluded that this Section "not only involves a presumption of the existence of pneumoconiosis but forecloses all fact finding as to the effect of that disease upon a particular coal miner upon a clinical finding of the presence of a chronic dust disease" and "is a departure from the overall pattern of the Act which makes the existence of both the disease and disability two (2) separate factors which must be established before liability is imposed" (J.S. 9A). The court held (J.S. 10A):

> To the extent that such presumption purports to mak[e] a finding of total disability in terms other than those provided by the Act as standards for total disability, it is unreasonable and arbitrary. As written, section 921(c)(3) is violative of due process in precluding the opportunity to present evidence as to the effect of a chronic dust disease upon an individual in determining whether or not he is disabled.

2. Section 411(c)(4) of the Act, 30 U.S.C. (Supp. III) 921(c)(4), provides that if a miner employed for more than 15 years in underground coal mines is unable to submit evidence satisfactory under Sec-

tion 411(c)(3), but "other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment," then a rebuttable presumption arises that the disability is caused by pneumoconiosis. This presumption may be rebutted only by evidence that the miner does not have pneumoconiosis, or that his "impairment did not arise out of, or in connection with, employment in a coal mine."

The district court sustained the constitutionality of the presumption that respiratory impairments of long-time miners are pneumoconiosis, but held that the limitation upon the evidence that can be used to rebut the presumption is "invalid as arbitrary and unreasonable" (J.S. 11A). The court concluded that because pneumoconiosis is not disabling *per se*, "[t]o require rebuttal evidence that a coal miner did not have pneumoconiosis is irrational where liability is not predicated on the mere presence of the disease, but rather on a complicated state of the disease" [18] (*ibid.*). The court further held: "There is no rational basis upon which the burden of proving that the impairment 'did not arise out of, or in connection with employment in a coal mine' can be placed upon a specific potentially liable coal mine operator" (J.S. 12A; footnote omitted).

3. The government's motion to amend these two portions of the judgment was denied (J.S. 29A-30A). The government's motion for a stay pending appeal

[18] Contrary to the district court's apparent assumption, however, Section 411(c)(4), unlike Section 411(c)(3), is not restricted to "a complicated state of the disease."

(J.S. 18A-28A) also was denied by the district court (J.S. 32A-35A). On April 28, 1975, this Court stayed the portions of the district court's judgment that are adverse to the government.

4. The district court rejected the remaining arguments of the plaintiffs.[19] The court upheld the application of the Act to miners whose employment ended before 1969, pointing out that the Act requires compensation only if the miner can establish that he is afflicted with the disease and that it was caused by his earlier employment. It concluded that the Act is not unconstitutional merely because the gravity of the risk of pneumoconiosis "was unknown to the coal industry at large" at the time some of the covered miners were working for the coal operators (J.S. 5A). The court also concluded that the statutory definitions were rational, and that it could not "superimpose its judgment on that of Congress" (*ibid.*). "No meaningful argument has been presented challenging the power of Congress to make such defini-

[19] The court declined to consider the legality or constitutionality of the regulations promulgated by the Secretary of Labor pursuant to the Act, remanding these questions to the single district judge for disposition. Although the court's pendant jurisdiction would have enabled it to consider these allegations (*Santin Ramos* v. *Civil Service Commission*, 376 F. Supp. 361 (D. P.R.) (three-judge court) relying on *Hagans* v. *Lavine*, 415 U.S. 528), appeal on another ground pending, No. 74-216; *National Independent Coal Operator's, supra*), and although we believe the court should have done so in the interest of efficient judicial administration, we have not contested the remand order.

tion[s] after receiving conflicting medical evidence about the disease" (J.S. 6A).

SUMMARY OF ARGUMENT

I

Plaintiffs contend that Part C of the Act is unconstitutionally retroactive to the extent that it compels mine owners to compensate miners who left their employment prior to the effective date of the Act.

A. Under the Act's statute of limitations, claims must be made within three years after discovery of the disease. All claims filed within three and one-half years of the effective date of the Act, however, became the exclusive responsibility of the federal government, and mine operators are not required to pay them. Disability commencing prior to the effective date of the Act is thus a federal responsibility. Plaintiffs' "retroactivity" claim, therefore, pertains only to miners who ceased work prior to the effective date of the Act and became disabled after the effective date.

The Act's application to claims based on disability arising after the effective date of the Act is not "retroactive"; under settled principles of tort law an employment transaction is not considered "closed" until all injuries occurring or diseases contracted during the employment have come to light. Since plaintiffs are required to pay only for diseases that became disabling after the effective date of the Act, it does not impose a retroactive burden upon them.

Nevertheless, the Act has a limited retrospective effect, in the sense that it makes plaintiffs liable for the latent consequences of acts they performed in the past. This limited retrospective effect is not a reason to invalidate the Act. The power of government to enact a reasonable remedy for a public ill is not negated "merely because it has some retrospective operation" (*Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 315). "[T]here is no constitutional inhibition against retrospective laws. Though generally distrusted, they are often beneficial, and sometimes necessary" (*Blount* v. *Windley*, 95 U.S. 173, 180).

B. Plaintiffs reply that Congress should have imposed its retrospective burden by levying a tax on all mine operators rather than by compelling each mine operator to be individually responsible for the pneumoconiosis contracted by its ex-miners. This contention, of course, undercuts the force of plaintiffs' retroactivity argument, for it admits that Congress has the power to compel mine operators to compensate miners for disease caused by pre-Act employment. We see no difference of constitutional magnitude between achieving that end by levying a tax and achieving it by creating a system of individual mine owner responsibility. Although the system of individual responsibility may put some mine owners—those with a longer employment history and, consequently, proportionally more claims to pay—at a competitive disadvantage, Congress is not constitutionally required to enact the method of financing

plaintiffs consider the most fair. Indeed, a tax on all mine operators arguably would be unfair because it would force more recent entrants to "subsidize" the compensation costs of mine operators who have been producing coal (and pneumoconiosis) over a longer period and who have been deriving profit therefrom.

Congress, rather than the courts, is entitled to select between these possible legislative remedies for a discerned social evil. "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it" (*Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488).

II

Plaintiffs object as well to the provisions of the Act that establish the system of liability-determination for all claimants, even those who continued working after the effective date of the Act. Although they concede that Congress has the power to establish a system of workers' compensation for miners, they contend that the Act is irrational and arbitrary. These arguments are unpersuasive. The Act contains, to be sure, a number of provisions that establish presumptions: long term miners who have a respiratory disease are rebuttably presumed to have pneumoconiosis; other sections of the Act allow miners to collect benefits even though they are not functionally disabled. But these provisions are responsive to the problems of proving pneumoconiosis and to the

nature of the many types of respiratory ailment caused by coal dust; they are neither irrational nor arbitrary.

A. 1. The Act defines total disability in a way that allows a miner to recover benefits if he is unable to engage in the area of his residence in employment using skills similar to those he used in mining coal. This definition meets the needs generated by the disease itself, which leaves its victims debilitated rather than helpless, and which strikes a large proportion of people in sections of the country that offer little alternative employment. The definition is a reasonable response to the nature of the disease and the communities in which it occurs.

2. In any event, Congress could have provided that all miners afflicted with respiratory diseases shall be compensated, whether or not they are able to work. Many workers' compensation plans, several of them upheld by this Court, establish schedules of benefits for those who are disfigured or suffer other injuries not related to earning capacity. If Congress can provide compensation for physical injuries that do not affect earnings, it follows directly that it can provide benefits for those who have contracted pneumoconiosis, even before that disease has destroyed the miner's ability to engage in gainful employment.

3. The district court incorrectly struck down the rule of Section 411(c)(3), which provides that a miner with "complicated pneumoconiosis" is "irrebuttably presumed" to be totally disabled. The district court held that this rule is proscribed by this Court's "irrebuttable presumption" cases.

Although Section 411(c)(3) uses the words "irrebuttable presumption," it is not a "presumption" of any sort. Its effect is simply to provide that all miners with complicated pneumoconiosis shall be compensated. Congress was entitled to make a decision that miners suffering from complicated pneumoconiosis—the final and inevitably fatal phase of the disease—are entitled to compensation even while still able to work. In the context of the Act, denominating these miners as "totally disabled" achieved that result. Although it would have been less complicated if Congress had stated: "All miners with complicated pneumoconiosis shall be compensated," the Act is not the less constitutional for its circumlocutory draftsmanship.

Even if Section 411(c)(3) is properly considered an irrebuttable presumption, however, it still is constitutional. Under the analysis of *Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975, Congress is entitled to use irrebuttable presumptions as long as those presumptions are reasonable and do not burden fundamental personal rights. Because Section 411(c)(3) is concerned with ordinary economic relations in the private sector instead of with fundamental personal rights, it is within the power of Congress.

B. The evidentiary and medical presumptions do not produce a perfect "fit" between the rule and classical pneumoconiosis. Some miners who have respiratory diseases other than pneumoconiosis will

be able to use these presumptions to recover benefits. But Congress was faced with a dilemma: the medical evidence before Congress demonstrated that (a) medical tests for pneumoconiosis are not fully reliable, and x-rays (the most accurate test) have an error rate exceeding 25 percent; and (b) many coal miners suffer from respiratory diseases similar but not identical to pneumoconiosis and for which x-ray evidence is completely unreliable. Therefore, if Congress were to require all miners with respiratory diseases to prove by medical evidence that they are afflicted with pneumoconiosis, many miners with diseases caused by coal dust would be unable to qualify for benefits. On the other hand, if Congress were to allow every miner with a respiratory disease to recover benefits, many miners whose diseases did not arise out of their employment would receive benefits.

Congress struck a compromise. It established presumptions that long-term coal miners with respiratory diseases have pneumoconiosis. Congress allowed mine operators to rebut these presumptions, but provided that x-ray evidence alone would not be sufficient to dissipate the presumptions' force. On the other hand, those who were miners for less than ten years must prove not only that they are totally disabled, but also that their respiratory disease is pneumoconiosis. This compromise is a reasonable accommodation of the competing interests, and is not unconstitutional merely because it does not create perfect congruity between the classes of those who will be

able to recover and the classes of miners for whom Congress would provide coverage under an ideal system. As *Salfi* pointed out (slip op. at 30): "Not only does the * * * [legislative] approach thus obviate the necessity for large numbers of individualized determinations, but it also protects large numbers of claimants who satisfy the rule from the uncertainties and delays of administrative inquiry" into the full particulars of their disease.

ARGUMENT

Black lung disease exists in epidemic proportions among miners and ex-miners. There is good reason to believe that at least 500,000 miners have suffered or died from black lung in recent years, and that many more miners will be afflicted with the disease in the future.[20] In Title II of the Coal Mine Health and Safety Act of 1969, Congress prescribed standards for the exposure of miners to coal dust; if these standards are adhered to, the incidence of the disease in tomorrow's miners should be much lower. But Congress did not think it sufficient merely to decrease the future incidence of the disease; it also enacted provisions to benefit miners already afflicted or who will become afflicted.

For many years occupational accidents and diseases have been compensable under state and federal workers' compensation plans. Workers commonly receive compensation if they lose time from work because of

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[20] See page 6, *supra*; pages 24-25, *infra*.

such causes; they also are compensated for disfigurement or other injury, even if their earning capacity is not affected. And, of course, they receive compensation if the injury or illness reduces their earning capacity without eliminating it.

Those who suffered from black lung disease have not been so favorably treated. Lack of compensation for black lung was brought about by a combination of causes, the foremost being that only in the last 40 years has coal miners' pneumoconiosis been recognized as a disease distinct from silicosis, and the fact that black lung often does not become manifest until long after the afflicted miner has ceased inhaling the coal dust responsible for his condition.[21] Congress sought to rectify these problems in the Act and its 1972 amendments. The Act makes it clear that black lung is a distinct and compensable disease, and establishes a federal compensation program that corrects the deficiencies Congress discerned in state workers' compensation laws.[22]

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[21] See page 7, *supra*. See generally 1A Larson, *The Law of Workmen's Compensation* §§ 41.31, 41.80 (1973); Leg. His., *supra*, n. 9, at 680, 904-906.

[22] Congress possesses ample power under the Commerce Clause to establish a compensatory system of this sort, and plaintiffs do not contend otherwise. Section 4 of the Act, 30 U.S.C. 803, provides that the Act applies to "[e]ach coal mine, the products of which enter commerce, or * * * affect commerce * * *." This Court repeatedly has upheld Congress' power to regulate working conditions and benefits provided by private employers when the industries engage in commerce, even though the particular activities Congress regulates are not "in" interstate commerce. See, *e.g.*, *Katzenbach* v. *Mc-*

This program became effective on December 30, 1969. Congress was well aware, however, that because many miners with black lung had not previously been entitled to workers' compensation, there were large numbers of uncompensated miners and exminers who already were suffering from the disease and for whom compensation should be made available immediately. As the House Committee report pointed out, general imposition of liability on private industry for all cases of black lung that had become manifest prior to the Act's effective date would have been unwise and unfair.[23] Congress therefore provided that the federal government would assume full liability for all benefits to be paid to those who filed claims prior to January 1, 1972 (30 U.S.C. 924(a) and (b)). The 1972 amendments extended this period of federal responsibility to include full responsibility for all claims filed through June 30, 1972, and partial responsibility for claims filed before January 1, 1974 (Sections 414(a) and 415, 30 U.S.C. (Supp. III) 924(a) and 925).

The federal government has, through these provisions, assumed the responsibility for benefits to almost all of the miners in the United States who have, or have died from, black lung disease. During the

Clung, 379 U.S. 294, 303-304 (restaurant service); *United States* v. *Darby*, 312 U.S. 100 (Fair Labor Standards Act); *Southern Ry. Co.* v. *United States*, 222 U.S. 20 (Safety Appliance Act). Cf. *Perez* v. *United States*, 402 U.S. 146.

[23] H.R. Rep. No. 91-563, reprinted in Leg. His., *supra*, n. 9, at 571.

period from December 30, 1969, to June 30, 1973, when claims could be filed under the Part B program, approximately 550,000 individuals claimed federal benefits. Approximately 352,000 of these claims were approved, and an estimated 484,600 persons were adjudged entitled to receive federal benefits (A. 42; Fourth Annual Report, *supra*.) By the end of 1974, the Social Security Administration had paid some $3.2 billion in benefits and was continuing to pay benefits at an annual rate of $1 billion.[24]

The burden the Act places on mine operators has been light by comparison. Since July 1, 1973, approximately 70,000 claims have been filed with the Secretary of Labor. The Secretary informs us that he expects new claims to be filed at a yearly rate of approximately 5,000 to 6,000 beginning in the current fiscal year. Of the 70,000 claims filed under the transitional provisions (Section 415) and Part C, a substantial number were filed by miners whose Part B claims had been denied. For the most part, their claims were denied again. Moreover, many of the 70,000 claims have been denied because they were filed after the three-year statute of limitations had run. Others have been denied simply for lack of proof. All told, the Department of Labor has approved for payment only 21.6 percent of the transitional and Part C claims upon which it has made

[24] Hearings on H.R. 7, H.R. 8 and H.R. 3333 (Black Lung Benefits Reform Act of 1975) before the Subcommittee on Labor Standards of the House Committee on Education and Labor, 94th Cong., 1st Sess. 215, 219 (1975) (hereafter 1975 House Hearings).

decisions. The mine operators have sought administrative review in 97 percent of the cases in which the Secretary has approved the claim; the Benefits Review Board has reviewed 12 claims to date.[25]

The claims for which mine operators such as plaintiffs may be liable fall into three categories. First, there are claims of miners who ceased work in the mines prior to December 30, 1969, and whose disease became disabling prior to December 30, 1969. These are the cases that can accurately be classified as produced by a "retrospective" application of the Act. However, mine operators are liable for few, if any, claims in this category. All of these miners could have received federal compensation under Part B; if the miner or his survivors filed a claim before July 1, 1973, the federal government has assumed full liability. Moreover, under the Act's three-year statute of limitations, a miner whose disease became disabling prior to December 30, 1969, was required to file his claim by December 30, 1972—during a period when full responsibility for all claims was assumed by the federal government.[26] Unless there is some basis for tolling the applicable statute of limitations, or an administrative error is made in its application,

[25] See Department of Labor, First Annual Report on Administration of the Black Lung Benefits Act of 1972 During Calendar Year 1974 and the Transitional Period in the Second Half of 1973, p. 10 (1975); 1975 House Hearings, *supra*, n. 24, at 122-149.

[26] Section 422(f)(1), 30 U.S.C. (Supp. III) 932(f)(1).

all miners who both ceased work and were disabled by pneumoconiosis prior to the effective date of the Act will be compensated by the federal government or not at all. There is no realistic probability of "true" retroactivity facing plaintiffs.[27]

Second, the pneumoconiosis of some miners who left mine employment prior to the effective date of the Act became disabling after June 30, 1970. For all such miners, the statute of limitations is long enough for them (or their survivors) to make claims under Section 415 or Part C, and these claims become the responsibility of plaintiffs. Plaintiffs assert that the Act is unconstitutional to the extent it allows miners who quit mine employment prior to December 30, 1969, to receive benefits paid by mine operators. We answer these arguments in Point I, *infra*.

Finally, some miners who were working in the mines on the effective date of the Act now have contracted pneumoconiosis. Plaintiffs concede that, in principle, Congress has the constitutional power to compel them to provide benefits to such miners. They argue, however, that the Act contains irrational and overbroad definitions and presumptions. We answer these arguments in Point II, *infra*.

[27] Under the regulations of the Department of Labor, however, mine operators are liable for the medical benefits of these "Part B" claimants, and could contend that the Act is retroactive to that extent. However, the district court did not pass upon the validity of the Secretary's regulations, and the question of the statutory authorization, or constitutionality, of those regulations is not before this Court.

I. CONGRESS IS CONSTITUTIONALLY EMPOWERED TO REQUIRE OPERATORS TO BE FINANCIALLY RESPONSIBLE FOR BLACK LUNG DISEASE CONTRACTED BEFORE 1969 BUT NOT MANIFEST UNTIL AFTER THE ACT'S PASSAGE

Plaintiffs' assault upon the "retroactive" application of the Act has two components. They argue that Congress lacks power to compel them to compensate those who left the mines prior to the effective date of the Act, and that even if Congress has such power, the power should be exercised by levying a tax on "the industry," rather than by imposing liability upon individual operators. We answer these arguments in turn.

A. The Limited Retrospective Operation Of Part C Is Constitutionally Permissible

Plaintiffs contend that Part C is unconstitutionally retroactive because it imposes new liability upon mine operators on the basis of mine employment completed prior to the effective date of the Act. We submit, to the contrary, that Part C is not retroactive, let alone unconstitutionally retroactive. The events that fix liability in the mine operators occur after the effective date of the Act; miners whose pneumoconiosis was discovered before 1970 are paid by the federal government.

Under settled principles of tort law, the date upon which liability for an injury or disease is fixed is the date upon which the injury becomes manifest. See American Law Institute, *Restatement (Second) of Torts* § 433(c), comment f (1965). The period of

"dealings" between a mine owner and its employee is not "closed" until the transactions between them have produced their full complement of physical effects. Indeed, it is hornbook law that an employment transaction is not considered "terminated" until any injuries and occupational diseases incurred or contracted during the employment have come to light. See 1A Larson, *The Law of Workmen's Compensation* § 41.80 (1973); 3 Larson, *supra*, at § 78.41 (1973) (collecting cases). The principle is the same when the employment relationship produces a festering disease rather than a concealed injury; plaintiffs cannot, by unilaterally "closing their books" on the employment transactions with their past employees, immunize themselves from legislative imposition of liability for injury that becomes manifest at some later date. The proper date for retroactivity analysis is the date upon which a miner's black lung disease is discovered. Because the Act's statute of limitations is three years, and because the federal government assumed in Part B full responsibility for all claims filed in the first three and one half years of the Act's operation, plaintiffs and other mine operators are not being called upon to pay claims for miners whose pneumoconiosis became disabling before the Act's effectiveness.[28] The Act is, therefore, not retroactive in the proper sense.

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[28] The Department of Labor has taken the position that the statute of limitations does not apply to claims made during the Section 415 transitional period. However, the transitional period did not begin until three and one-half years after the Act became effective, and is unlikely to result in a significant

We do not dispute, however, that the Act has some retrospective effect, in the sense that many of the transactions that gave rise to a miner's black lung disease preceded the passage of the Act. But the power of government to enact a reasonable remedy for a public ill is not negated "merely because it has some retrospective operation." *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 315. If the public need is great, and the retrospective effect reasonable in relation to that need, the power of Congress prevails over the expectations of private corporations. See *Campbell* v. *Holt*, 115 U.S. 620, in which, as was the case in *Chase Securities Corp.*, the Court upheld state laws extending statutes of limitations, even though the extensions revived liability for transactions that some had regarded as long closed. The Constitution does not diminish the power of Congress to make laws for the public welfare simply because those laws may affect transactions that some parties consider "closed". See *Curtis* v. *Whitney*, 13 Wall. 68, 70 ("That a statute is not void because it is retrospective has been repeatedly held by this court, * * *"); *Ferguson* v. *Skrupa*, 372 U.S. 726; *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398; *Blount* v. *Windley*, 95 U.S. 173, 180 ("[T]here is no constitutional inhibition against retrospective laws. Though generally distrusted, they are often beneficial, and

number of claims that are properly classified as retroactive. If and when such claims arise, the question of retroactivity and of the applicability of the statute of limitations can be litigated.

sometimes necessary"). There are many other cases in which the Court has sustained legislation retrospectively creating liability or extinguishing expectations. We set forth in the margin but a few of them.[29]

Plaintiffs rely upon a single case—*Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330—to blunt the force of this long line of cases upholding legislation with retrospective effects. Even if *Alton* can be considered good law in light of the many later (and earlier) cases of contrary purport, it does not offer much support to plaintiffs. The district court correctly distinguished it (J.S. 4A-5A). *Alton* dealt neither with a person whose disease was discovered after the enactment of remedial legislation, nor with personal injuries or illnesses of any sort, but with purely economic interests (retirement and pension plans) of employees whose employment relationship already had been terminated. Retirement plans are

[29] See *Lichter* v. *United States*, 334 U.S. 742 (legislation requiring renegotiation of war contracts to recapture excessive profits); *Fleming* v. *Rhodes*, 331 U.S. 100 (retroactive effect of price control legislation upon leases); *Norman* v. *Baltimore & Ohio R. Co.*, 294 U.S. 240 (legislation invalidating contract clauses requiring obligor to repay indebtedness in gold); *Philadelphia, Baltimore & Washington R.R.* v. *Schubert*, 224 U.S. 603 (invalidating contractual avoidance of liability under Employers' Liability Act of 1908); *Louisville & Nashville R.R.* v. *Mottley*, 219 U.S. 467 (legislation prohibiting use of free passes previously extended in settlement of lawsuit).

See generally Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Calif. L. Rev. 216 (1960); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960).

the equivalent of deferred salary, and the law in *Alton* therefore can be regarded as a legislative attempt to compel employers to increase the salary of their employees after the work had been completed. Workers' compensation plans perform an altogether different function by compelling employers to make employees whole for injuries done to them; the Act gives nothing to a miner who does not suffer or die from pneumoconiosis.

B. Congress Is Empowered To Require Each Mine Operator To Bear The Costs Of Black Lung Of Its Ex-Miners, Rather Than To Impose The Costs On "The Industry" As A Whole

Plaintiffs attempt to draw an analogy to recent decisions under the Due Process and Equal Protection Clauses and seek strict scrutiny of the Act, to the extent it places heavier burdens on some mine operators than others. They argue that the Act's method of allocating costs—each operator must pay the benefits due to miners who used to work in its mines—will place some mine owners at a competitive disadvantage to other mine owners who have fewer ex-miners eligible for black lung benefits. Plaintiffs suggest that Congress should have imposed an industry-wide tax to create a fund out of which to pay black lung benefits; this tax, they suggest, would avoid the inequities of individual mine owner liability.

This argument seriously undermines plaintiffs' contention that Congress is without power to compel mine operators to bear retrospective liability for the pneumoconiosis of miners who ceased work before 1970. If Congress levied such a tax, it would take

the property of mine operators in order to compensate miners, the very "flaw" in Part C of which plaintiffs complain. If Congress has the constitutional power to compel mine operators to compensate their ex-miners, Congress should be able to exercise that power by establishing a system of individual responsibility no less than by establishing a system of collective responsibility operating through a tax. The cost of either program would be approximately the same, and would fall on the same group of companies.

While thus apparently conceding that Congress can compel mine operators to compensate ex-miners, plaintiffs argue merely that the method Congress chose is less "fair" to some mine operators than is an alternative method. They point out that the Act may place mine operators with many disabled ex-employees at a competitive disadvantage to mine operators with fewer disabled ex-employees. However, if Congress had adopted plaintiffs' suggestion and imposed a tax on all mine operators, recent entrants into the mining business could then have complained that it would be "unfair" to tax them in order to provide benefiits to miners they never employed, in order to recompense the miners for disease they never caused.

Plaintiffs' argument that the Act is "unfair" to mine operators that are responsible for more black lung disease than their competitors does not approach the claim of "invidious discrimination" necessary successfully to attack a social welfare measure dealing with corporations. *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359. This Court has

afforded legislatures wide latitude in fixing the obligations owed by employers to their employees (*United States* v. *Darby*, *supra*; *Nebbia* v. *New York*, 291 U.S. 502), and the employer must do more than simply claim that the legislation is "unfair" in some particulars. "The day is gone when this Court uses the Due Process Clause * * * to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488. See also *Ferguson* v. *Skrupa*, 372 U.S. 726; *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421. "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it" (*Williamson*, *supra*, 348 U.S. at 488). Even if an Act "exact[s] a needless, wasteful requirement in many cases * * * it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement" (*id.* at 487).

The Act meets the test established by this Court. There is "an evil at hand for correction" and "it might be thought that" individual mine operator liability "was a rational way to correct it." Plaintiffs' argument that a better way could have been devised is not material; it is no more than a legislative argument. There is nothing inherently irrational in the decision of Congress that firms that have been producing coal (and pneumoconiosis) for a longer period, and profiting therefrom, should bear more of

the cost of the program than do more recent entrants into the industry.

The principles of cases such as *Williamson* have not, as plaintiffs contend, been discarded by this Court. The cases plaintiffs cite for this proposition (Br. 31-32, 60-63) pertain, as the Court recently made clear, only to legislation touching upon fundamental personal rights. See *Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975, slip op. 16-20, 33. For legislation touching on ordinary business decisions and interests, however, *Williamson* still states the governing rule, a rule permitting wide "latitude to legislate decisions regulating the private sector of the economy" (*Salfi*, *supra*, slip op. at 22). See also *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156; *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356.

Accordingly, Congress was constitutionally entitled to require mine operators to bear liability in proportion to the number of their miners that have succumbed to pneumoconiosis, as this Court held in *National Independent Coal Operator's*, *supra*.[39]

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[39] Plaintiffs have argued (Motion to Affirm in No. 74-1302, at 8-10) that *National Independent Coal Operator's* "was not even brought to challenge the constitutionality of Title IV" and, consequently, that this Court's summary affirmance is "inapplicab[le]" (*id.* at 8, 10). But the complaint in that case clearly challenged the constitutionality of Title IV, making the same contentions appellants now make (see par. 20 of the *NIOCA* complaint, reprinted at *id.*, p. 9). NIOCA's jurisdictional statement was addressed almost entirely to constitutional claims, which plaintiffs have repeated. We submit, therefore, that this Court's summary affirmance in that case is dispositive of many issues in this case.

II. THE COMBINATION OF DEFINITIONS AND PRESUMPTIONS CONTAINED IN TITLE IV IS A PERMISSIBLE LEGISLATIVE SOLUTION OF THE PROBLEM OF DETERMINING WHO SHOULD BE COMPENSATED

Whether or not plaintiffs' arguments against the application of Part C to miners who left employment prior to 1970 are accepted by this Court, plaintiffs will continue to be required to compensate miners who left their employment or died from the disease in 1970 or thereafter. Although they concede that Congress has the power, consistent with the Constitution, to establish a program of workers' compensation for miners who suffer or die from black lung disease, they contend that many of the features of Title IV are unconstitutional. They seek, in essence, an order from this Court instructing Congress to start over again and devise what would be, from their point of view, a "better" workers' compensation program. But Congress is not constitutionally required to tailor its workers' compensation programs to plaintiffs' conception of the good, and Title IV, we submit, is consistent with the Constitution.

Coal miners' pneumoconiosis is a disease that afflicts many coal miners who have inhaled substantial quantities of mine dust. Some symptoms of black lung appear in a substantial proportion—perhaps more than half—of all long term coal miners.[31] Although the disease is widely prevalent among miners, many of its symptoms are similar to the

[31] See page 6, *supra*.

symptoms of other respiratory diseases related to coal dust inhalation, and even sophisticated tests sometimes are unable to provide a clearcut diagnosis or ascertain the cause of the disease.[32] Based on the extensive medical evidence it has received, Congress decided to alleviate the problems of proof in individual cases by adopting a series of definitions and presumptions, based on Congress' understanding of the nature of pneumoconiosis and related diseases and reflecting the medical probability that if a coal miner who has worked many years in the mines develops a respiratory disease, that disease most likely is pneumoconiosis.

The statutory provisions interlock. Any miner who can prove that his ailment is "complicated pneumoconiosis"—the last and terminal stage of the disease—is "irrebuttably presumed" to be totally disabled and consequently is entitled to benefits whether or not he is physically unable to work (Section 411 (c)(3)). A miner with a less-advanced stage of the disease is subjected to a different set of presumptions and requirements of proof. First, the miner bears the burden of proving that he is "totally disabled," a term defined by statute (Section 402(f)) and regulation (20 C.F.R. 410.412(a)(1)) as inability to engage, in the area of the miner's residence, in work requiring skills similar to those he employed when able to work as a miner.

Second, once a miner has proved that he is "totally disabled" and is afflicted with a respiratory ailment,

[32] See pages 49-55, *infra*.

he is entitled to the benefit of three rebuttable presumptions if and only if he has worked as a miner for a lengthy period. (a) If a miner who has worked in the mines for ten years or more contracts pneumoconiosis, there is a rebuttable presumption that the pneumoconiosis arose out of his employment (Section 411(c)(1)). The mine operator can rebut this presumption by adducing evidence that the individual was not exposed to coal dust that might have caused the disease (Section 422(c)). (b) If a miner dies of a respiratory disease after working ten or more years in the mines, there is a rebuttable presumption that his death was caused by pneumoconiosis (Section 411(c)(2)). The mine operator can rebut this presumption by demonstrating that dust conditions in his mine could not have caused pneumoconiosis or by demonstrating that the proper diagnosis of the miner's disease was other than pneumoconiosis. The mine operator cannot rely upon x-ray evidence alone to discharge this burden (Section 413(b)). (c) If a miner dies after working 15 or more years in the mines, but x-ray or other available evidence shows that he did not have complicated pneumoconiosis, there is nevertheless a presumption that his death was due to pneumoconiosis if his survivors can prove that he had a totally disabling respiratory disease. The mine operator can rebut the presumption by proving that the disease was not pneumoconiosis or did not arise out of mine employment (Section 411(c)(4); Section 422(c)); x-ray evidence is not by itself sufficient to discharge this burden of refutation (Section 413(b)).

The nub of plaintiffs' claim is that these presumptions are hard to rebut, particularly because of the limited usefulness of x-ray evidence; in consequence, plaintiffs argue, some non-disabled miners who had respiratory diseases other than classical pneumoconiosis (or not arising out of mine employment) will be entitled to receive benefits. All of this is true, but it does not, we submit, establish that the Act is unconstitutional. Acting upon the evidence before it, Congress was entitled to conclude that it had two basic alternatives. It could establish a system of definitions and presumptions that would make it relatively simple for miners with respiratory diseases caused by mine employment to recover; in that event some who were not victims of classical pneumoconiosis would nevertheless receive benefits. Congress alternatively could require each miner with a respiratory disease to prove that the disease was black lung rather than something else; in that event many victims of that disease would fail in their proof and be denied benefits. Because black lung is difficult both to prove and to disprove, neither alternative would enable Congress to make a "perfect fit" between its categories and those who "deserve" benefits; between the possible approaches—one making it difficult for miners to prove that their respiratory disease was pneumoconiosis, and the other making it difficult for mine operators to prove that the disease was not pneumoconiosis—Congress was entitled to choose the former.

> [T]he question [is not] whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than nonmembers. The question is whether Congress, its concern having been reasonably aroused * * *, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. * * *
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> * * * * *
>
> There is thus no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce.

Weinberger v. *Salfi*, *supra*, slip op. at 25, 33.

A. The Act's Definition Of "Total Disability" Is Constitutional

1. The definition of "total disability" is reasonable

Section 402(f), 30 U.S.C. (Supp. III) 902(f), defines "total disability" as the miner's inability to engage "in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time." Plaintiffs argue (Br. 57-59) that this definition is arbitrary and irrational, noting that it was opposed by representatives of the Departments of Health, Education, and Welfare and Labor, who preferred the more restrictive definition in the 1969 Act. Plaintiffs' challenge apparently is based upon their view that the definition is unwise; they do not argue that Congress is without power to provide compensation to anyone not disabled in a more usual sense.

Congress had strong reasons for rejecting the traditional definition here; it was well aware that coal miners whose health is broken by pneumoconiosis are for all practical purposes, unemployable. Thus, Senator Byrd stated (Hearings on S. 2675, S. 2289 and H.R. 9212 (Black Lung Legislation, 1971-1972) before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st and 2d Sess. 210 (1972)):

> Some of our colleagues may feel that the coal miner must meet the same disability criteria applied to workers in other occupations, but in all justice, I believe we must take recognition of the uniquely severe conditions under which the coal miner has labored and of the fact that once incapacitated for this work at mid-point or near the end of his working life, he is not retrainable as are individuals who have worked in other occupations.
>
> He usually is not educated for work requiring sophisticated mental skills; and he will not be up to any job requiring even ordinary physical exertion.

> Furthermore, in the region of the coal mines there are few if any other jobs in which he might be employed.
>
> We cannot expect a man so spent in body and spirit to pull up stakes and relocate.

In light of these considerations, Congress adopted a less restrictive definition of total disability than that contained in the Social Security Act. The Senate Report explains (S. Rep. No. 92-743, 92d Cong., 2d Sess. 16-17 (1972)):

> The Committee makes no judgment on whether the test in Title II of the Social Security Act, "inability to engage in any substantial gainful activity," is an appropriate definition of application to the total universe of workers in the Nation. But, it is unrealistic when applied to coal miners, if it results in the denial of claims of miners who for medical reasons can no longer be expected to work in the mines and for whom there is no, too often, other realistic employment opportunity, or for whom the only opportunity for employment may be at wages far less than they would have earned had they been able to continue to work in their usual jobs.

The legislative power to define a compensable condition in terms that reflect an evaluation of economic, medical, and social evils the legislature seeks to remedy is settled. *Geduldig* v. *Aiello*, 417 U.S. 484, 494-495. The definition of "total disability" adopted by Congress reflects just such a policy choice, based upon a rational understanding of the economic realities facing coal miners afflicted with pneumoconiosis.

2. Congress is empowered to establish compensation programs for injured miners, whether or not they are disabled

Plaintiffs' argument against the Act's definition of "total disability" appears to rest in large measure upon the unstated assumption that if a miner is able to work at some job, Congress lacks the power to provide for his compensation. That assumption is erroneous. Congress has the power to establish programs requiring private employers to pay their employees compensation for disability that is less than total. Accordingly, the Act is not unconstitutional merely because it requires the plaintiffs to compensate miners who are not physically prevented from performing all work.

Most workers' compensation programs, including the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1427-1428, as amended, 33 U.S.C. 908(c), include what are usually called "scheduled benefits." If an employee suffers a physical injury that does not make him unemployable, he receives compensation, in a fixed amount, to recompense him for that injury. Section 908(c) establishes scheduled payments for numerous injuries, including loss of a finger, partial blindness, and so on. Specified benefits are payable for each injury whether or not the injury affects the employee's ability to work or his wage earning capacity. Congress' determination that miners who have pneumoconiosis should be compensated even if only partially disabled by the disease is supported by similar reasoning.

Indeed, this Court has upheld the constitutionality of workers' compensation provisions that provide benefits based upon a medical condition rather than upon current inability to work. *New York Central R.R. Co.* v. *Bianc*, 250 U.S. 596, sustained a New York statute conferring benefits upon employees who suffered an employment-related facial disfigurement but no loss of ability to work. See also *Arizona Employers' Liability Cases*, 250 U.S. 400, 433 (opinion of the Court; Holmes, J., concurring). And in *Urie* v. *Thompson*, 337 U.S. 163, 181-187, the Court held that occupational diseases are compensable as "injuries" under the Federal Employers' Liability Act whenever the disease "impairs or destroys an employee's health" (*id.* at 186). The Court intimated no doubt about the constitutionality of compensation for diseases that impair health but do not reduce earning capacity. *A fortiori*, Congress has the power to require plaintiffs here to compensate miners with pneumoconiosis, whether or not that disease has destroyed the miner's capacity to engage in all gainful employment.

3. *The conferral of benefits in Section 411(c)(3) on all miners with complicated pneumoconiosis is constitutional*

Section 411(c)(3) provides that any miner who can prove by competent medical evidence that he is afflicted with "complicated pneumoconiosis," the final and terminal stage of black lung disease,[33] is "ir-

[33] Dr. William H. Stewart, Surgeon General of the United States, testified: "In its advanced form, it [pneumoconiosis] leads to severe disability and premature death." 1969 Senate Hearings, *supra*, n. 3, at 719. Similarly, Dr. Leon Cander, Chairman of the Department of Medicine of the University of Texas Medical School, an acknowledged expert in pulmonary medicine, testified:

> Once progressive massive fibrosis develops, there is no way to prevent its relentless progress. If you remove the miner from the mine, it does not matter; the disease progresses.
>
> * * * * *
>
> Patients with progressive massive fibrosis, however, usually die of either pulmonary insufficiency or heart failure caused by pulmonary disease. [*Id.* at 858.]

As Congressman Dent noted, "when the victim reaches the fourth stage, known as progressive massive fibrosis or complicated pneumoconiosis * * * he has a fatal, uncurable and irreversible disease. At that time he is destined to die from the disease." Leg. His., *supra*, n. 9, at 693.

rebuttably presumed" to be "totally disabled due to pneumoconiosis" within the meaning of the Act. Because all "totally disabled" miners are entitled to benefits, the effect of Section 411(c)(3) is to provide that all miners with complicated pneumoconiosis are entitled to benefits. Plaintiffs assert, and the district court held, that Section 411(c)(3) is unconstitutional because it establishes an "irrebuttable presumption." We submit, to the contrary, that Section 411(c)(3), although cast in terms of a "presumption," establishes a reasonable rule of liability well within the power of Congress. And, even if viewed as an "irrebuttable presuption," Section 411(c)(3) still is constitutional.

a. *Section 411(c)(3) establishes a rule of entitlement to benefits rather than an "irrebuttable presumption" of physical disability*

The district court's characterization of Section 411 (c)(3) as an irrebuttable presumption that, in fact, miners with complicated pneumoconiosis are "totally disabled" and *therefore* entitled to compensation, is inaccurate. Although Section 411(c)(3) uses the words "irrebuttable presumption," it does not create a presumption of any sort. Congress has done no more than to provide that all miners with complicated pneumoconiosis, a terminal and irreversible disease, are to be compensated whether or not they are able to work.

The irrebuttable presumption cases, as this Court discussed them in *Salfi*, *supra* (slip op. at 19-25, 29-33), fit a single pattern: the legislature has created a prophylactic rule. A legislature, in order to address fact B (in *Salfi*, sham marriages), irrebuttably infers fact B from fact A (in *Salfi*, short duration of marriage). In all cases of this sort there is some lack of congruity between the presence of fact A and the presence of Fact B. The legislative classification will bear harshly on persons who have fact A, but do not have fact B. Such a legislative classification will be evaluated by the courts to determine whether there is sufficient congruity between A and B—and sufficient difficulty in proving B directly—to support the decision of the legislature to use the prophylactic rule in order to reduce the economic and social costs of administering the program. Although inferrring B

from A will work to the disadvantage of some persons, requiring the government to prove B directly might be very costly and work to the disadvantage of others.

Section 411(c)(3) does not fit this pattern. Congress, in order to address fact A (complicated pneumoconiosis), has provided that any miner who can prove fact A is entitled to recover. Since, as we have demonstrated above (pages 43-44, *supra*), Congress has authority to require employers to compensate employees who have diseases that are not disabling, it follows that Congress can require employers to compensate miners who have complicated pneumoconiosis, whether or not the complicated pneumoconiosis prevents them from working.

In short, Section 411(c)(3) is not a legislative determination that, contrary to fact, all (or even some) miners afflicted with complicated pneumoconiosis are unable to work. It expresses instead a decision by Congress that all miners with complicated pneumoconiosis should be compensated. In the context of the Act, denominating these miners as "totally disabled" produces that result. Although it surely would have been less complicated if Congress had stated: "All miners with complicated pneumoconiosis shall be compensated," the Act is not the less constitutional for its circumlocutory draftsmanship. Congress' choice of language does not affect its constitutional power to provide for compensation of miners with complicated pneumoconiosis; unless it lacks such power, Section 411(c)(3) should be sus-

tained. The validity of the exercise of legislative power does not depend upon the form of words Congress used to make the result come about."[34]

b. *Even viewed as an "irrebuttable presumption," Section 411(c)(3) is constitutional*

The Court thoroughly re-examined the "irrebuttable presumption" cases only a few months ago in *Salfi*. It identified the dispositive factor differentiating those irrebuttable presumptions that it had held unconstitutional from those it had not: the unconstitutional irrebuttable presumptions involved legislative decisions touching on suspect categories or fundamental rights.[35] *Salfi*, *supra*, slip op. at 16-20, 33. The Court referred to, and approved, decisions upholding irrebuttable legislative presumptions affecting only the private sector of the economy (*id.* at 20-25). Section 411(c)(3) affects only the private sector of the economy, and does not affect any fundamental personal right of plaintiffs. Under the analysis used

[34] This principle, of course, works both ways. For Congress to call something an "irrebuttable presumption" no more makes it one (within the meaning of this Court's cases) than calling it a "definition" or a "rule of liability" takes it outside the reach of those cases (if the legislation in fact provides that one fact shall be inferred from proof of another).

[35] See generally Simson, *The Conclusive Presumption Cases: The Search for a Newer Equal Protection Continues*, 24 Catholic U. L. Rev. 217, 228-223 (1975); McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Sup. Ct. Rev. 34; Comment, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. Chi. L. Rev. 807 (1973).

in *Salfi*, therefore, Section 411(c)(3) is constitutional even if it is viewed as an "irrebuttable presumption." "Congress could rationally have concluded that any imprecision from which [Section 411(c)(3)] might suffer was justified by its ease and certainty of operation" (*id.* at 28).

B. The Evidentiary Rules And Medical Presumptions Of The Act Are Reasonable

We have described in detail (pp. 37-38, *supra*) the medical presumptions and limitations upon rebuttal evidence contained in the Act. Plaintiffs complain that because there is not a perfect fit between these presumptions and the incidence of classical pneumoconiosis, they will be required to compensate some miners whose respiratory disease may not, in fact, be classical pneumoconiosis (and, therefore, may not have arisen out of mine employment). But here, as in *Salfi*, *supra*, slip op. at 30: "Not only does the * * * [legislative] approach thus obviate the necessity for large numbers of individualized determinations, but it also protects large numbers of claimants who satisfy the rule from the uncertainties and delays of administrative inquiry" into the full particulars of their disease. Congress had before it abundant evidence from which it was entitled to conclude that, without such presumptions and limitations upon rebuttal evidence, many deserving miners with respiratory diseases caused by their employment would be unable to recover (see pp. 50-55, *infra*). The evidence to this effect was so great that, we submit, it

would have been constitutional for Congress to provide that *all* miners and ex-miners, no matter how short of duration of their mine employment, would be entitled to receive compensation for every respiratory disease.[36] Congress did not go that far, and plaintiffs are hardly in a position to complain that Congress provided them with rebuttal opportunities when the Constitution does not require it to do so, and that it limited the Act's medical presumptions to miners who had been employed in the mines for ten years or more.

In any event, as we shall now show in some detail, the presumptions and limitations at issue were a proper legislative response to the evidence that was before Congress.

1. *The limitations upon the use of medical evidence are supported by the nature of the disease and the limited reliability of x-ray diagnosis*

Plaintiffs' objection to the medical presumptions is grounded in the limitation on the use of medical evidence contained in Section 413(b) (30 U.S.C. (Supp. III) 923(b)). The important feature of Section 413 (b) is its direction to the Secretary of Labor that "no claim for benefits * * * shall be denied solely on the basis of the results of a chest roentgenogram." [37]

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[36] See S. Rep. No. 92-743, 92d Cong., 2d Sess. 10 (1972), establishing that coal miners are far more susceptible than the general population to respiratory diseases of all sorts.

[37] Section 413(b) further provides that "all relevant evidence shall be considered, including" blood gas studies, x-ray results, pulmonary function studies, electrocardiograms, physical performance tests, and affidavits of a physician and the miner's wife. Section 411(c)(4) provides that a wife's

Plaintiffs contend that, unless chest x-rays standing by themselves can negate a claim for benefits, many miners who have respiratory diseases other than classical pneumoconiosis will qualify for benefits. This, like many of plaintiffs' other arguments, however, is a complaint about the wisdom of Congress' policy choices, not about its constitutional power to make them.

Prior to the passage of the Act in 1969, several physicians with experience in pneumoconiosis diagnosis and treatment urged Congress to prohibit denial of claims solely on the basis of a negative x-ray.[38] However, the 1969 Act directed the Public Health Service, the National Institutes of Health, and the Social Security Administration to develop diagnostic tests for pneumoconiosis.[39] Congress neither approved nor disapproved full reliance on x-rays.

The Social Security Administration devised evaluatory criteria based almost entirely upon x-ray findings. The legislative history of the Black Lung Benefits Act of 1972 shows that Congress was not satisfied with these criteria. The hearings conducted by Congress in contemplation of the 1972 amendments revealed that (1) autopsy evidence indicated a 25 percent error in diagnosis where claims evaluation

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affidavit, standing alone, is not sufficient medical evidence to qualify for benefits.

[38] 1969 Senate Hearings, *supra*, n. 3, Part 2, at 660-664, 693, 1028.

[39] *Id.* at 664.

was made on x-ray findings alone;[40] (2) current medical knowledge supported the conclusion that cardio-pulmonary conditions other than classical pneumoconiosis, and which are not diagnosable by x-ray, are associated with dust exposure in the coal mines,[41] and (3) that coal miners are subject to such respiratory diseases at a rate far in excess of the general population.[42] Congress therefore determined that complete reliance upon x-rays as a means of disproving pneumoconiosis would deny benefits to many miners afflicted with respiratory diseases arising out of coal mine employment.

The Senate Report on the 1972 Amendments observed:[43]

> The art of medical diagnosis of coal miners' respiratory impairments is not so precise that a miner's benefit should stand or fall on the basis of a single test. Every available medical tool should be used to assist a miner in successfully pursuing his claim for benefits. * * *
>
> * * * * *
>
> The mine environment produces a variety of hazards to the miner's health. Not only is he exposed to coal dust, but also sand and rock dust containing harmful amounts of silica, fine

[40] S. Rep. No. 92-743, *supra*, n. 36, at 9-16; H.R. Rep. No. 92-460, 92d Cong., 1st Sess. 8-10 (1971); H.R. Conf. Rep. No. 92-1048, 92d Cong., 2d Sess. 9 (1972).

[41] *Ibid.*

[42] *Ibid.*

[43] S. Rep. No. 92-743, *supra*, n. 36, at 15, 16.

> enough to reach the innermost portions of the lungs. Few miners have not experienced repeated respiratory insults associated with the inhalation of fumes from cable fires, blasting, or burning hydraulic fluid. * * *

In short, Congress properly concluded that there was an unacceptable rate of diagnostic error associated with x-rays, and its decision not to permit sole reliance on negative x-rays is supported by the uncontradicted evidence before it.[44]

2. *The presumptions arising from long duration of employment are rationally based*

Plaintiffs' suggestion that the duration of employment provisions should be struck down because they are irrational is baseless. Although it is true that pneumoconiosis develops because of exposure to coal dust, and that a miner who works longer in a less dusty environment may not be exposed to as much dust as a miner who works for a shorter period of time in a dustier environment, this does not undermine the presumptions in Section 411 that are triggered by a lengthy period of mine employment. Since it is impossible to ascertain the amount of dust to which a miner has been exposed, it was reasonable for Congress to substitute a closely related

[44] See also 117 Cong. Rec. 40428-40458 (1971).

factor that is readily ascertainable—length of employment.[45]

This legislative determination is strongly supported by medical evidence before Congress that pneumoconiosis does not become prevalent among miners until they have worked at least ten years in the mines.[46] And, in referring to the use of a fifteen-year presumption, the Senate Report noted[47] that "[t]he fifteen year period * * * merely reflects the testimony of the Surgeon General in 1969, who stated:

> 'For work periods less than 15 years underground, the occurrence of pneumoconiosis among miners appears to be spotty and shows no particular trend. For work periods greater than 15 years underground, there was a linear increase in the prevalence of the disease with years spent underground.' "

Plaintiffs' argument that there is no rational basis for the presumptions triggered by duration of employment is, therefore, unavailing. *Weinberger* v. *Salfi, supra; Ferguson* v. *Skrupa, supra; Williamson* v. *Lee Optical Co., supra.* An evidentiary presumption exceeds the power of Congress only if the presumption is a "purely arbitrary mandate" (*Mobile, Jackson & Kansas City R.R.* v. *Turnipseed*, 219

[45] Pneumoconiosis is related to the number of years of employment in the mines. 1969 Senate Hearings, *supra*, n. 3, Part 2, at 634-637, 658-659, 720, 757-765.

[46] *Id.* at 699, 742. Cf. *id.* at 641; *id.*, Part 3 at A91-A96.

[47] S. Rep. No. 92-743, *supra*, n. 36, at 13.

U.S. 35, 43). The presumptions of Section 411 are not "purely arbitrary." [48]

3. *The district court improperly invalidated the limitations on evidence contained in Section 411 (c)(4)*

Section 411(c)(4) of the Act provides that a miner employed for 15 years or more in a coal mine, but unable to prove that he has complicated pneumoconiosis, is rebuttably presumed to be (or, if deceased, to have been) totally disabled because of pneumoconiosis, if he can present evidence of a totally disabling respiratory or plumonary impairment. Unlike Section 411(c)(3), which creates a rule of substantive law, this section creates an evidentiary presumption in cases where a miner cannot demonstrate that his pneumoconiosis has reached the progressive or complicated state. The miner (or the Secretary in his stead) must prove lengthy employment, the presence of a respiratory disease, and total disability. A presumption then arises that the disease is pneumoconiosis. The section then provides that this presumption can be rebutted "only" by evidence that the miner did not have pneumoconiosis or that the im-

[48] Plaintiffs rely upon cases such as *Levy* v. *United States*, 395 U.S. 6, to support their argument that the Act's rules and presumptions are not sufficiently rational. But *Leary* was a criminal case, and in order to support a verdict of guilt a presumption must be accurate in the individual case as well as rationally supportable as applied to the class of cases. See *Barnes* v. *United States*, 412 U.S. 837; *Turner* v. *United States*, 396 U.S. 398. The legislature has far broader discretion in drawing inferences and establishing classifications in economic regulatory legislation. See *Weinberger* v. *Salfi, supra.*

pairment did not arise out of employment in a coal mine.

The district court held this provision arbitrary and unreasonable because it forecloses evidence that would refute total disability. This holding is based upon a misreading of Section 411(c)(4). Because the claimant must establish total disability, within the meaning of the Act, before the presumption of pneumoconiosis arises, the "only" clause does not operate until all evidence relevant to disability has been received. The Section does not preclude a mine operator from demonstrating that the claimant is not disabled. Proof of total disability is a condition precedent to the operation of the rebuttable presumption, and the government has so construed it.[49] The district court's constitutional conclusion thus must fall once its statutory misapprehension is corrected.[50]

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[49] The regulations implementing the Act provide that a miner must establish "total disability" by a sufficient factual showing. 20 C.F.R. 410.412, 410.422-410.426; 20 C.F.R. Part 718.

[50] The district court also concluded that Section 411(c)(4) is irrational because it places upon a specific coal mine owner the burden of proving that the respiratory or plumonary disease arose out of coal mine employment. The Section imposes no such burden. The "only" clause provided the manner in which the presumption contained in Section 411(c)(4) can be rebutted. The operator also can defeat liability by proving that the disability did not arise, at least in part, out of employment in his mines (30 U.S.C. 932(c)), in which event the Section 411(c)(4) presumption is irrelevant.

4. Plaintiffs are not entitled to a full trial at which they can introduce evidence concerning the rationality of Congress' decisions

Finally, plaintiffs contend that they are entitled to a trial, in order to present evidence to demonstrate that the medical presumptions and limitations upon rebuttal evidence are not consistent with the weight of medical authority. It may well be that the plaintiffs could put before the district court substantial medical authority to support their views; much evidence to that effect was before Congress itself.[51] But the district court's function is not to weigh the evidence and decide which path it would have followed if it were making the laws; its inquiry is limited to whether Congress has chosen a rational course. *Williamson* v. *Lee Optical Co.*, *supra*; *Ferguson* v. *Skrupa*, *supra*. The evidence adduced before Congress provides ample support for the statute's rationality and, as the district court correctly concluded, "[n]o meaningful argument has been presented challenging the power of Congress to make [its decisions] after receiving conflicting medical evidence about the disease" (J.S. 6A; footnote omitted).

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[51] See, *e.g.*, 1969 Senate Hearings, *supra*, n. 3, Part 3, at A91-A96; Leg. His., *supra*, n. 9, at 904.

CONCLUSION

Paragraphs (1) and (2) of the district court's judgment (J.S. 14A-15A) should be reversed. Paragraph (3) of the judgment (J.S. 15A) should be affirmed.

Respectfully submitted.

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Nos. 74-1302 and 74-1316
Consolidated

JOHN T. DUNLOP, Secretary of the United States Department of Labor, et al.,
Defendants-Appellants,

vs.

TURNER ELKHORN MINING COMPANY, et al.,
Plaintiffs-Appellees.

TURNER ELKHORN MINING COMPANY, et al.,
Plaintiffs-Appellants,

vs.

JOHN T. DUNLOP, Secretary of the United States Department of Labor, et al.,
Defendants-Appellees.

Appeals from the United States District Court
for the Eastern District of Kentucky

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-1302 and 74-1316
Consolidated

JOHN T. DUNLOP, Secretary of the United States Department of Labor, et al.,
Defendants-Appellants,

vs.

TURNER ELKHORN MINING COMPANY, et al.,
Plaintiffs-Appellees.

TURNER ELKHORN MINING COMPANY, et al.,
Plaintiffs-Appellants,

vs.

JOHN T. DUNLOP, Secretary of the United States Department of Labor, et al.,
Defendants-Appellees.

Appeals from the United States District Court for the Eastern District of Kentucky

CONSOLIDATED BRIEF FOR TURNER ELKHORN MINING COMPANY, et al.

OPINION BELOW

The opinion of the district court is reported at 385 F. Supp. 424; it is printed in the Jurisdictional Statement in Case No. 74-1302 at Appendix A, pp. 1A-13A, and in the Jurisdictional Statement in Case No. 74-1316 at Appendix B, pp. 1b-13b.

JURISDICTION

The judgment of the district court was entered on November 20, 1974 (J.S. No. 74-1302, App. B, pp. 14A-15A).

The appellants in No. 74-1302 filed a motion to amend the judgment (J.S. No. 74-1302, App. C, pp. 16A-17A) on December 2, 1974, which was denied on December 19, 1974 (J.S. No. 74-1302, App. E, pp. 29A-30A). They filed their notice of appeal to this Court on January 16, 1975 (J.S. No. 74-1302, App. F, p. 31A). By order of March 10, 1975, Mr. Justice Stewart extended the time for docketing the appeal to and including April 16, 1975, and it was docketed on that date.

The appellants in No. 74-1316 filed notice of appeal to this Court from Paragraph (3), of the judgment of the district court on January 20, 1975 (J.S. No. 74-1316, App. C, pp. 1c-3c). By order of March 10, 1975, Mr. Justice Stewart extended the time for docketing the appeal to and including April 19, 1975. Appellants docketed the appeal on April 18, 1975.

This Court noted probable jurisdiction in each of these cases on June 9, 1975, and consolidated them for review (App. 46). The jurisdiction of this Court in each of the cases is conferred by 28 U.S.C. Sections 1252 and 1253.

QUESTIONS PRESENTED

1. Do the provisions of the Coal Mine Health and Safety Act requiring individual coal mine operators to pay benefits to their former employees, or their survivors, in connection with occupational disease incurred prior to enactment of the law constitute an arbitrary and irrational legislative means for providing economic relief to financially distressed inactive miners and their families, in violation of rights guaranteed mine operators by the Due Process Clause of the Fifth Amendment to the Constitution?

2. Has Congress violated rights guaranteed mine operators under the Due Process Clause of the Fifth Amendment to the Constitution by imposing upon them a statutory scheme of compensation for total disability due to occupational disease which, by virtue of the arbitrary, over-inclusive legislative presumptions and eligibility criteria incorporated therein, will require mine operators to pay benefits to:

   a) claimants who in fact are disabled by nonwork-related diseases, rather than work-related coal worker's pneumoconiosis; and

   b) claimants whose disease may or may not be work-related but who, in any event, are not in fact totally disabled by the disease at all?

Should the district court have given the plaintiff mine operators a full opportunity to prove at a trial that the statute does operate in such an arbitrary and over-inclusive fashion?

3. Was the district court correct in concluding that the irrebuttable presumption of total disability due to occupational disease set up in Section 411(c)(3); 30 USC §921 (c)(3) of the Act is unconstitutionally arbitrary because it forecloses any fact finding as to the actual disabling effect of the disease on a particular claimant, contrary to the clear intent of the Act that the existence of the disease and disability therefrom are two separate factors which must be independently established before liability may be imposed?

4. Was the district court correct in concluding that it was unconstitutionally arbitrary for Congress to decree, as it has in Section 411(c); 30 USC §921(c) of the Act, that a so-called "rebuttable" presumption of total disability due to occupational disease may only be rebutted by proof that the claimant does not have the disease at all, or did not contract it in his employment—rather than by proof that he is not actually disabled by it?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution, which provides in relevant part:

   no person shall • • • be deprived of life, liberty, or property, without due process of law; • • •

2. Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. §§901, *et seq.*, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, the relevant provisions of which are appended to this Brief at pp. 1a-9a.

STATEMENT OF THE CASE

Introduction

These appeals arise out of a suit brought by 22 coal mine operators[1] to enjoin the implementation and enforcement of Title IV of provisions of the federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 USC §§901, *et seq.*, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, imposing liability on mine operators for the payment of benefits to former and present mine workers and their families, ostensibly in connection with total disability occasioned by a single occupational disease known as coal workers' pneumoconiosis.[2]

The law in question establishes a system of economic relief of enormous scope for former coal mining employees that is completely without precedent or parallel in federal or state legislation. It represents a unique congressional experiment in the use of workmen's compensation mechanisms as a means to achieve legislative ends which plaintiffs contend are alien to the limited purposes such laws rationally can serve. The employer liability provisions of the Act are unique in two respects: they are used as a ve-

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1 Appellees in No. 74-1302, appellants in No. 74-1316; for clarity hereinafter referred to as "plaintiffs." The court below granted in part and denied in part the relief sought. On these cross-appeals, the parties have agreed to combine their arguments on the merits in each case in single briefs.

2 Coal workers' pneumoconiosis is a physiological condition resulting from inhalation of coal dust, which in its advanced stages may cause physical disability and death. Development of this condition to its disabling stage is a function of the concentrations of coal dust to which a mine worker is exposed and the duration of that exposure. See discussion at pp. 46-48, *infra*.

hicle for providing economic relief in the nature of reparations to persons who had left the work force prior to enactment of the law, and the eligibility for benefits of former and present employees is dictated substantially by statutory presumptions and other eligibility criteria governing the determination of disability due to occupational disease which make the law over-inclusive and lend it the character of a pension law, not a workmen's compensation law.

Legislative History of the Act

As first proposed in 1969, the disability benefits provisions of the Coal Mine Health and Safety Act were intended to create a modest and temporary program of federally financed emergency relief for aging and ill inactive mine workers and their families. Provisions imposing liability upon mine operators for payment of benefits were added to the Act only two days prior to its enactment, and virtually without congressional deliberation. The final version of the Act (S. 2917) had been drafted by a House-Senate Conference Committee as a compromise between the conflicting versions previously passed by the Senate (S. 2917) and the House (H.R. 13950), neither of which provided for payment of benefits by mine operators.[3]

As originally reported by the Senate Committee on Labor and Public Welfare on September 17, 1969, Senate Bill 2917 contained no provision for payment of black lung benefits to disabled miners in any form. The bill dealt only with health and safety conditions in mines.[4]

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3 House Comm. on Education and Labor, 91st Cong., 2d Sess., *Legislative History/Federal Coal Mine Health and Safety Act* 963 ff. (Comm. Print 1970) (Hereinafter cited as "*1969 Legislative History*").

4 *1969 Legislative History* 1 ff.

Subsequently the bill was amended to provide for the payment of interim emergency benefits to coal miners (or their children and widows) who had become totally disabled and unable to work (or had died), prior to the effective date of the Act, from complicated pneumoconiosis arising out of mining employment. Benefits were to be paid only through fiscal year 1973, in part out of federal funds and in part through a system of matching grants to the states. The amendment contained an appropriation of 70 million dollars to fund the program for 3½ years.[5]

Statements in floor debate made by the sponsors of this amendment leave no doubt that it was intended to be a program of temporary economic relief for inactive miners which was to be financed by federal funds as a matter of national obligation, rather than by the mining industry.

In debate on September 26, 1969, Senator Byrd of West Virginia said:

> I just want to urge the manager of the bill at this time to devote every effort possible over the weekend to work out some program whereby these old and disabled miners, who have contracted this disease, perhaps 5, 10, or 15 years ago, and who have been in forced retirement for all these years but who have not qualified under State statutes for disability payments, can be given assistance through some Federal-State program.
>
> I personally would urge that the cost of such a program be borne initially by the Federal Government. I hesitate to think that we would have to load an additional expense on the management of the mines at this time when overhead costs are already very high and at a time when it is difficult for the product to remain competitive in the marketplace.

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5 *1969 Legislative History* 334-49.

I want to express the hope that we might devise some way for the Federal Government, along with the States, over a period of years, to shoulder the burden of the cost so that the mine management would not have to carry this additional burden.

But I strongly believe that out of fairness to the miners, and to the wives and widows of miners who have lost their lives through the contracting of pulmonary diseases from the inhalation of silica and coal dust, we in Congress have a responsibility to work out some program whereby disabled miners would be given help when they are not eligible under State workmen's compensation programs. Many of them cannot qualify under State statutes which are not retroactive, and yet they do need assistance. I would like to see them get assistance so they would not have to be on welfare programs, so that they could have some steady income, and so that they might be able to provide for themselves and their families.[6]

In introducing the amendment on September 30th, Senator Williams of New Jersey said:

> I am gravely concerned about a problem, not now covered by S. 2917, which I believe needs attention by the Congress, namely the problem of providing some means of protection to the miner and his dependents we have forgotten—the inactive coal miner who is totally disabled and unable to work because he contracted pneumoconiosis or black lung while working in the coal mines.
>
> • • •
>
> It is estimated by the Public Health Service that about 9 percent of the number of nonworking miners in this country are suffering from complicated pneumoconiosis. Yet, in many cases, these former miners and their dependents are not eligible for compensation

[6] *Id.* at 256-57.

> payments under State laws. At present, only seven States, West Virginia, Pennsylvania, Colorado, Alabama, Virginia, Tennessee, New Mexico, and Ohio provide any benefits for persons afflicted with this disease. In most cases, the State programs do not cover former miners or widows of miners or only provide minimal benefits for those people.[7]

Senator Javits of New York, speaking in support of the amendment, particularly emphasized his belief that providing such relief was a moral obligation of the nation as a whole:

> In S. 2917, the Committee on Labor and Public Welfare has reported out a measure which we on the committee believe will end this deathly scourge once and for all. But we have done nothing to help those who have already fallen prey to black lung—to those who might not have been disabled and forced to spend the rest of their lives as vegetables had we only seen our duty and done it sooner.
>
> I say "our duty" advisedly. For the root of the problem is the utter failure of all of us, and that includes the industry, the medical profession, and the Government—particularly the Public Health Service—to recognize this disease before being embarrassed into doing so—at least 20 years late, by Great Britain and other European countries.
>
> Our failure to recognize coal workers' pneumoconiosis as a separate disease has had two particularly insidious effects: First, it obviously precluded any attempts, through private efforts or legislation, to control coal dust, and second, it operated to prevent many miners from black lung [sic] from obtaining even minimally decent workmen's compensation. As a result, the thousands of inactive miners disabled by black lung

[7] *1969 Legislative History* 328.

are not only condemned to life as virtual invalids, they must also live out that life in abject poverty.

• • •

I emphasize, Mr. President, that the entire Nation shares the responsibility for this tragic situation; witness after witness who testified on this bill stressed America's complete insensitivity to the problem of black lung until very recently—it was not until the mid-1950's that black lung was recognized by responsible medical authorities as a disease. Britain, on the other hand, began to recognize the disease in 1934, and it became compensable in 1943. In the United States, until last year, only three States recognized black lung as a compensable disease; in other States the only way miners could receive compensation is if they could convince examining boards they had silicosis, which usually was not possible.[8]

Senator Byrd, speaking on the same day said:

> Mr. President, I consider it a necessity that we pass legislation to provide disability benefits to miners suffering from pulmonary diseases, because in so many instances the State statutes, not being retroactive, do not reach the old disabled miner who long ago has been forced into retirement as a result of his having acquired black lung, pneumoconiosis, silicosis, or some other pulmonary disease through employment in the mines.[9]

H.R. 13950 did contain a provision for federally-financed benefits for total disability due to *complicated* pneumoconiosis when it was reported out of the House Committee on Education and Labor on October 13, 1969.[10] The Committee Report described the purpose of the benefits provision as follows:

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8 *1969 Legislative History* 338-39.

9 *Id.* at 346.

10 *1969 Legislative History* 933.

Subsection (b) provides payments to miners totally disabled from complicated pneumoconiosis and to the widows of miners who suffered from complicated pneumoconiosis at the time of death. The disease must have arisen out of or in the course of the individual's employment in a coal mine. If he was so employed for 10 years or more, there is a rebuttable presumption that the disease so arose; if he was not, the individual must demonstrate that his disease so arose.

• • •

Payments under this subsection are for retroactive cases only, and not for prospective cases.

• • •

These provisions of the bill are a limited response in the form of emergency assistance to the miners who suffer from, and the widows of those who have died with, complicated pneumoconiosis.

• • •

One of the compelling reasons the committee found it necessary to include this program in the bill was the failure of the States to assume compensation responsibilities for the miners covered by this program. State laws are generally remiss in providing compensation for individuals who suffer from an occupational disease as it is, and only one State—Pennsylvania—provides retroactive benefits to individuals disabled by pneumoconiosis.

Also, it is understandable that States which are not coal-producing have no wish to assume responsibility for residents who may have contracted the ailment mining coal in another State. The substantial reduction in the number of miners actually employed in mines following World War II caused a dispersal of men throughout the country—many into States which have few, if any, mines. These men took with them an irreversible disease, but because of their present location are denied benefits.

The committee also recognized the problems inherent in requiring employers to assume the cost of compensating individuals for occupational diseases contracted in years past.

The resolution of this dilemma, consistent with the desperate financial need of individuals eligible to receive payments under this bill, was the inevitable inclusion of section 112(b), and the requirement that the payments be made from general revenues.

It is hoped that the health standards prescribed in title II will eliminate conditions in mines which cause the disease. Also, it is expected that the States will assume responsibility in their respective compensation plans for miners who contract the disease in the future.[11]

The reasons underlying the Committee's decision to provide for payment of benefits out of federal funds were described in greater detail by Representatives Perkins of Kentucky, Dent of Pennsylvania and Daniels of New Jersey in Floor debate on October 27.

Representative Perkins:

> Existing State compensation laws are in most instances inadequate to meet the real needs of miners disabled by black lung. Even where compensation payments are made, they are frequently below the minimum subsistence level, or miners disabled by the disease are ineligible on the basis of some technicality. For example, they may have worked in a State other than that in which they reside when the disease catches up to them, or the number of employers they worked for makes it difficult to assign the costs of compensation to those who might be held legally responsible for the disability.

11 *1969 Legislative History* 569-71.

> One thing is clear, however. The coal produced by these victims of black lung was sold throughout the United States at prices lower than it could have been if compensation costs had been paid at the time that the disability was incurred. Consequently, compensation for past damage to a coal miner's health can, we believe, logically be considered a national responsibility. The bill provides for payments to miners where the State does not assume responsibility or where the payments are inadequate.[12]

Representative Dent:

> The committee also recognizes the possible inequities inherent in requiring employers to assume the costs of compensating individuals for occupational diseases contracted in years past.
>
> Many miners have worked in more than one coal mine and for more than one employer. Who can determine precisely when that miner contracted pneumoconiosis and for whom he was working?
>
> The resolution of this dilemma, consistent with the desperate financial need of individuals eligible to receive payments under this bill, was the inevitable inclusion of section 112(b), and the requirement that the payments be made from general revenues.
>
> • • •
>
> The miners for whom this program is intended became victims of pneumoconiosis many years ago. They were mining coal for national consumption, and for an industry under intense Federal pressure to keep the cost of the fuel low. The entire Nation benefited from the use of coal and its low cost. The entire Nation then, has an obligation to the miners who became the unfortunate recipients of an insidious disease in the process, and to their widows and minor children.[13]

12 *Id.* at 654.

13 *1969 Legislative History* 719-20.

Representative Daniels:

> This Nation's failure to take cognizance of coal miners' pneumoconiosis as a separate clinical study some 20 years after this dreaded disease was recognized by Great Britain and other European countries has had five particularly unfortunate results:
>
> First, it precluded attempts by private enterprise to control coal dust in the mines in order to prevent the effects of this insidious disease.
>
> Second, it caused States to neglect the problem when it was in its inception and the cost of prevention could still be economically borne by State governments or private enterprise.
>
> Third, it operated to prevent disabled coal miners from obtaining workmen's compensation, proper medical care, and other remedial action. Thus, many thousands of miners have died before their claims were processed or the statute of limitations expired which prevented many miners from proving their claims in time to receive benefits.
>
> Fourth, it is economically impossible for most States to provide funds for retroactive claims.
>
> Fifth, it is unconstitutional to make private employers pay these claims.
>
> Therefore, section 112(b) is an attempt to do something about a situation which was created to a major extent by Federal neglect.[14]

On October 27th the House passed H.R. 13950, and amended S. 2917 to substitute the text of H.R. 13950 for that drafted and passed in the Senate, and the two versions of S. 2917 were sent to Conference Committee for reconciliation.

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14 *Id.* at 815.

On December 16, 1969, the Conference Committee reported out a substitute bill that differed in major respects from either the House or Senate versions—especially with regard to disability benefits, where, among other things, Part C governing mine operator liability for benefits was added. The Conference Committee Report noted the new employer liability provision but gave no reason for the change.

The House passed the Conference Bill on December 17, 1969, the Senate passed it a day later, and it was signed into law on December 30, 1969.

The Disability Benefits Programs Created by the Act.

The workmen's compensation scheme devised and adopted in the closing days of 1969 (and amended in 1972) is set out in Title IV of the Act, which consists of three parts: Part A (§§401, 402; 30 USC §§901, 902) contains a general statement of the purpose of the title, and defines certain terms used in the title. Part B (§§411-414; 30 USC §§921-924) creates a program for the processing and payment out of federal revenues of claims for black lung benefits filed on or before December 31, 1973, and Part C (§§ 421-424; 30 USC §§931-934) creates a program under which mine operators are responsible for the payment of benefits after December 31, 1973.

According to the congressional declaration, Title IV was designed to achieve two purposes:

> "Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease or

who were totally disabled by this disease at the time of their deaths; and that few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents. It is, therefore, the purpose of this title to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease or who were totally disabled by this disease at the time of their deaths; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis."[15]

It is important to note that the two benefits programs created by Title IV do not coincide with the two separate purposes the title was designed to serve. That is, the federally-financed Part B was not intended to, nor did it function to provide benefits in all cases of black lung disability or death that had arisen prior to enactment of the law, and the operator-funded Part C was not intended to, and in operation will not be limited to miners now actively employed in mining activities who may become eligible in the future. The distinction between the two benefits programs primarily is chronological.

The benefits program created by Part B of the Act is administered by the Secretary of the Department of Health, Education and Welfare through the Social Security Administration.

Section 411; 30 USC §921 directs the Secretary to "make payments of benefits in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any miner whose death was due to pneumoconiosis or

15 Act, section 401; 30 USC §901.

who at the time of his death was totally disabled by pneumoconiosis", and sets out certain presumptions concerning the existence of the disease and its causation which the Secretary is required to apply in determining a claimant's entitlement to benefits. Paragraph (c) of Section 411 provides that:

> (c) For purposes of this section—
>
> (1) If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment;
>
> (2) If a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis;
>
> (3) If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disable due to pneumoconiosis or that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be; and
>
> (4) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection

> with such miner's, his widow's, his child's, his parent's, his brother's, his sister's, or his dependent's claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. • • •

While these presumptions are termed "rebuttable" in the Act, in reality there is no way to rebut them in the vast majority of cases except through the use of x-ray evidence (see discussion at pp. 48-55, *infra*); the Act, however, expressly forbids the denial of a claim solely on the basis that x-ray evidence fails to show the presence of the disease. Section 413(b); 30 USC §923(b). Disproof of the presumption of total disability erected in subparagraph (4) of Section 411(c) is rendered even more difficult by the additional proviso that it may be rebutted ". . . only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine."

Section 412; 30 USC §922 of the Act provides for the payment of lifetime benefits to miners and former miners whom the Secretary of HEW finds to be "totally disabled" —as that term is defined in the Act—due to pneumoconiosis, and to the widows of miners and former miners whom the Secretary finds to have died of pneumoconiosis, or who were receiving benefits at the time of their death. In addition, benefits are payable under Section 412 to the dependent children, or parents, or brothers and sisters of miners and

former miners whom the Secretary finds died of pneumoconiosis, or were "totally disabled" by such disease at the time of death, or were receiving benefits at the time of death, and to the children of widows who die while receiving benefits. Benefits on claims filed under Part B before July 1, 1973 are payable for as long as the recipient remains eligible.

Part C of the Act was designed to handle only those claims filed after the termination of the Part B program and before December 31, 1981[16] by persons who are not entitled to benefits under the workmen's compensation law of a state formally recognized by the Secretary of Labor as affording coverage equivalent in scope to that of the federal law. Section 421(a); 30 USC §931(a) of Part C provides that:

> On and after January 1, 1974 any claim for benefits for death or total disability due to pneucomoconiosis shall be filed pursuant to the applicable State workmen's compensation law, except that during any period when miners or their surviving widows, children, parents, brothers, or sisters, as the case may be, are not covered by a State workmen's compensation law which provides adequate coverage for pneumoconio-

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16 Section 422(e); 30 USC §932(e) provides that "no payment of benefits shall be required under this section: . . . (2) for any period prior to January 1, 1974; or (3) for any period after twelve years after the date of enactment of this Act." While it would appear that the language of subparagraph (3) requires that all *benefit payments* terminate in 1981, the Secretary of Labor interprets the language to mean that no new *claims* will be considered after that date, but benefits awarded on claims filed prior to that date will be payable for the life-time of the recipient or recipients. Legislative history does not resolve the ambiguity in this language.

sis they shall be entitled to claim benefits under this part.[17]

No State's compensation law yet has qualified for such official recognition by the Secretary of Labor, and there is little prospect that any state will so qualify. Part C, therefore, constitutes, for all practical purposes, a single-disease, single-industry, retroactive, federal workmen's compensation statute.[18]

The categories of persons eligible for benefits under Part C are the same as those described in Section 412(a); 30 USC §922(a) as eligible under Part B—that is, miners and former miners, their widows, or their surviving dependent children, or parents, or brothers and sisters.[19] As under Part B, claimants may be found eligible for benefits even if the disability or death upon which the claim is based occurred before enactment of the law, and even if the miner was not employed in mining at the time.[20]

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17 Claims filed during the period July 1, 1973 to December 31, 1973 are processed jointly by the Secretaries of HEW and the Department of Labor pursuant to the provisions of sections 414, 415; 30 USC §§924, 925.

18 Section 422(a); 30 USC §932(a) provides that coal mine operators' liability for benefits shall be governed, with certain exceptions, by the provisions of the Longshoremen's and Harbor Workers' Compensation Act, modified as the Secretary of Labor deems appropriate to implement the provisions of Part C.

19 Act, Section 422(c); 30 USC §932(c).

20 Section 422(f)(1); 30 USC §932(f)(1) does contain a statute of limitations requiring that Part C claims filed within three years of "discovery" of disability or of the date of death, but that limitation is illusory in the case of a living miner's claim, because under the definitions, standards and presumptions of this law, breathing impairments common to the aging non-mining population which are not *medically* identifiable as coal workers' pneumoconiosis, and not in fact totally disabling would be *legally*

(footnote continued on following page)

The definitions, standards and presumptions (including the limitation on negative x-ray evidence) governing the determination of whether a miner has or had pneumoconiosis and is or was "totally disabled" by it, also govern such determinations under Part C.[21]

One of the major differences between the Part B and Part C programs is that the amount of benefits for which a mine operator may be liable under Part C is greater than that which the government is responsible for paying under Part B, because Part C benefits include life-time medical expenses incurred by a recipient in connection with his disease;[22] there is no such provision in Part B.

A coal mine operator is liable under Part C for the payment of benefits in connection with the disability or death

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considered to be both for purposes of awarding benefits. See discussion at pp. 48-59, *infra*. The resulting tendency of the law to award benefits to persons with respiratory ailments of any nature simply because they have a mine work history is one of the principal points of contention in this suit.

21 Act, Sections 421(b)(2)(C), 422(h), 430; 30 USC §§931(b)(2)(C), 932(h), 940. The only exception is that claims based upon the 15-year presumption created in Section 411(c)(4) of Part B must be filed within three years of last exposed employment (in the case of a living miner), or 15 years of last exposure (in the case of death), Section 422(f)(2); 30 USC §932(f)(2), and the 15 years of employment referred to in the presumption must have occurred prior to July 1, 1971. Section 430; 30 USC §940.

22 The medical benefits provisions of Section 7 of the Longshoremen's and Harbor Workers' Act are incorporated into Part C by reference in Section 422(a); 30 USC §932(a). In fact, the Secretary of Labor has taken the position that mine operators are liable to pay the medical expenses of persons already receiving Part B benefits where the qualifying employment relationship is present. See 20 CFR §§720.109(a), 725.102(a). Plaintiffs challenged the Secretary's authority to promulgate these regulations in their complaint (Appendix p. 23); the district court has reserved judgment on the issue (J.S., No. 74-1302, App. A, p. 2A).

of his present and former employees from pneumoconiosis if the Secretary of Labor finds that the pneumoconiosis arose, at least in part, out of employment by such operator.[23] Operators are also made liable for the payment of benefits to the former employees of any mine they have acquired since December 30, 1969.[24]

All operators are required to secure their liability for benefits through private insurance, self-insurance, or participation in a state fund. If an operator fails to secure his liability or pay benefits, the Secretary of Labor is required to pay them, and the operator becomes liable to the United States in a civil action for the amount paid. The Secretary of Labor must also pay benefits to a claimant when there is no operator found who can be held responsible under the law.[25]

Economic Scope and Impact of the Benefits Programs

Immediately prior to the original enactment of the Coal Mine Health and Safety Act in 1969, congressional proponents of the Black Lung Benefits title of the Act estimated that there were approximately 50,000 retired and disabled miners and 3,300 active miners who could qualify for benefits upon enactment, and that the cost of the program could be no more than $120 million per year.[26]

By the end of the second year of the program, 350,000 claims had been filed, 159,500 had been allowed (33,100

23 Act, Section 422(c), (h); 30 USC §932(c), (h).

24 Act, Section 422(i); 30 USC §932(i). The prior operator also remains liable.

25 Act, Sections 423, 424; 30 USC §§933, 934.

26 *1969 Legislative History* 1114, 1078, 1148.

miners and 71,400 widows) and 25,000 were pending. Over $532 million had been paid out since the beginning of the program and recurring monthly payments had reached $28 million.[27]

In May of 1972, Title IV was amended to extend by 18 months the time within which claims for federal life-time benefits could be filed, the claimant's burden of proving his claim was eased by adoption of a liberalized definition of total disability, medical proof requirements were drastically relaxed, surface miners were brought within the Title, additional dependents and survivors were made eligible, and the Social Security Administration was ordered to reconsider most of the claims it previously had denied on the basis of the stricter eligibility criteria.[28]

At the close of the Part B program on June 30, 1973, some 550,000 applications for benefits had been filed with the Social Security Administration; as of December 31, 1974, $3.2 billion had been paid to over 500,000 beneficiaries, and continuing payments are being made at the rate $1 billion annually.[29]

The Department of Labor began entertaining claims for which mine operators could be held liable under the Part

27 U.S. Dep't of Health, Education & Welfare, *Second Annual Report to Congress on the Administration of Part B of Title IV of the Federal Coal Mine Health and Safety Act of 1969* p. 9 (Soc. Sec. Pub. No. 80-72, 1973).

28 Certain of these amendments, contained in the Black Lung Benefits Act of 1972, and their unconstitutionality as applied to mine operators through Part C of Title IV are discussed at pp. 48-59, *infra*.

29 House Comm. on Education and Labor, Subcomm. on Labor Standards, 94th Cong. 1st Sess., *Hearings on H.R. 7, H.R. 8, H.R. 3333* ("*Black Lung Benefits Reform Act of 1975*") pp. 215, 219. (Social Security Administration testimony). Hereinafter cited as *1975 House Hearings*.

C program on July 1, 1973. By mid-February of 1975, approximately 60,000 applications had been filed.[30] Statistics compiled by the Staff of the House Committee on Ways and Means in 1974 indicate that roughly 60% or more of applications under the Part B program were filed by living miners, and the remainder by survivors.[31] The percentage of applications filed by living miners under Part C is much greater. [32] To put these claims figures in perspective: according to testimony given before the House Subcommittee on Labor Standards by the American Insurance Association in February of 1975, there were only 153,000 persons working as coal miners in the United States as of November, 1974; in 1939 there were 454,000 active coal miners.[33] There were only 6,651 cases of compensable death or permanent total disability resulting from other insured work injuries or diseases in the entire nation in 1973.[34]

Even though claims under the Part C program are subject to certain limitations on filing and adjudication to

30 *1975 House Hearings* 123 (Department of Labor testimony). According to this testimony, initial eligibility determinations had been made in approximately 34% of the cases, of which approximately 22% were favorable to the claimant.

31 House Comm. on Ways and Means, *Committee Staff Report on the Disability Insurance Program* p. 414, Table 110 (July 1974).

32 U.S. Dept. of Labor, *First Annual Report on Administration of the Black Lung Benefits Program of the Coal Mine Health and Safety Act*, p. 10 (May 30, 1975).

33 *1975 House Hearings* 14.

34 *Id.* at 15.

which Part B claims are not subject,[35] under Part C mine operators will be liable to broader categories of claimants, and in higher benefit amounts. Under Part C, operators not only must pay benefits similar to those payable on Part B claims, they are also liable for the payment of medical benefits to disabled miners. Under the Secretary of Labor's interpretation of the Act, such medical benefits are available not only to miners filing for the first time after July 1, 1973, but to all miners now receiving Part B federal benefits who refile and qualify. It has been conservatively estimated that the value of a Part B claim averages some $80,000, and that the medical benefits provided under Part C add another $21,600 to that value,[36] making a mine operator's potential exposure per claim some $91,600.

The cost of insuring against this liability promises to be extraordinarily burdensome for coal mine operators. Plaintiffs submitted in the district court the affidavit of an expert insurance actuary who estimated an industry exposure of almost $280 million annually from presently employed miners alone, and a $2 billion exposure for payment of medical benefits to former miners.[37] By way of comparison, total compensation paid through the workmen's compensation system in the entire nation in 1970 amounted to $3 billion, which included medical services, cash benefits for total and partial disability, benefits to

35 Claims must be filed within three years of discovery of total disability, or of death, and the 15-year presumption does not apply to years after 1972. See discussion at pp. 21-22, *supra*. Also some claims filed under Part C will be payable by the federal government because no responsible operator can be found.

36 Deposition of George F. Reall, National Counsel on Compensation Insurance, p. 54, filed in the district court on February 25, 1974.

37 Affidavit of J. Huell Briscoe, Appendix p. 34.

survivors, and burial allowances. Medical benefits accounted for $1 billion of the total.[38] According to testimony taken on deposition in the proceedings below, the authoritative National Council on Compensation Insurance was etablishing occupational disease rates in many states in the area of $25 per one hundred dollars of payroll for deep mines, which represents in most cases some one-half to three-quarters of the total compensation rate paid by mine operators.[39] Again, by way of comparison, in 1971 compensation rates nationwide averaged only from 10 cents per one hundred dollars payroll for insurance companies, to $2.00 per one hundred dollars payroll for primary metals industries.[40]

A 1973 study of the potential impact of the black lung program on the mining industry of Kentucky, were that state to adopt the federal plan, estimates that compensation insurance rates could reach over $43 per hundred dollars payroll for large mines, and over $60 per hundred dollars payroll for small mines by 1973, and that if other Kentucky industry should cease to share the compensation burden as it now does, rates could reach approximately $139 and $194 per hundred dollars payroll for large and small mines, respectively. [41]

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38 National Comm'n on State Workmen's Compensation Laws, *Compendium on Workmen's Compensation*, 31, 145 (1973).

39 Reall Deposition, Note 36 *supra*, Exhibit A.

40 U.S. Chamber of Commerce, *Employee Benefits 1971* Table 6 (1972).

41 Univ. of Kentucky College of Business and Economics, *Projected Direct Impact of Black Lung Program on Kentucky With Emphasis on the Kentucky Coal Industry: A Preliminary Report* 8-9 (July 1973) (A copy of this document appears as Item No. 2 in the separately-bound appendix filed in the district court in conjunction with plaintiffs' memorandum of law in support of their motion for summary judgment, and is included in the record on appeal.)

The Decision of the Three-Judge District Court Below

Plaintiffs filed suit to enjoin the implementation and enforcement of Part C of Title IV of the Act in August of 1973. They charged in their Complaint (Appendix pp. 11-25) that the imposition of liability on them to pay benefits to former employees or their survivors in connection with occupational disease incurred prior to enactment of the law violated their rights to due process and equal protection of law; that the period-of-employment presumptions set out in Clauses (1), (2) and (4) of Section 411(c) of the Act, 30 USC §921(c) were unconstitutionally arbitrary and and irrational bases upon which to predicate coal mine operators' liability to pay benefits; that the regulations promulgated by the Secretary of Labor governing the determination of the particular employer to be held liable on a particular claim embodied arbitrary and irrational irrebuttable presumptions which violated the employer's right to due process of law; and, that the regulations of the Department of Labor imposing liability on coal mine operators to pay medical benefits to claimants already receiving federally financed indemnity benefits under the Part B program were not authorized by the Act.

In February, 1974, plaintiffs filed a motion for summary judgment (Appendix pp. 29-38) supported by answers to interrogatories, responses to requests for admission of facts, depositions, affidavits of a medical expert and an actuarial expert, and documents produced by the Labor Department. The defendants moved to strike all of the evidence submitted by plaintiffs in support of their summary judgment motion, and filed, in addition, a motion to dismiss the action, and a cross-motion for summary judgment. (Appendix pp. 39-45).

In its decision of November 19, 1974, the three-judge district court ruled as to plaintiffs' first claim, that ". . . the decision of Congress to impose [liability on operators] on what may be called remote claims of those former miners no longer in the work force was an exercise of its lawful power under the Constitution." (J.S. No. 74-1302 App. A, p. 6A). The court also upheld the constitutionality of the period-of-employment presumptions in Clauses (1), (2) and (4) of Section 411(c) of the Act, 30 USC, §921(c), apparently on the grounds that the presumptions were rational and capable of being rebutted. (J.S. No. 74-1302 App. A, pp.8A-9A). The Court did, however, find the presumption governing determination of total disability set out in Clause (3) of Section 411(c), 30 USC §921(c), and the limitation of rebuttal evidence in the last sentence of Clause (4) of Section 411(c), 30 USC §921(c), violative of mine operators' rights under the Due Process Clause of the Fifth Amendment (J.S. No. 74-1302 App. A, pp.9A-12A), and enjoined the Secretary of Labor from applying them. (J.S. No. 74-1302 App. B, p15A).

The three-judge court held that it had no jurisdiction to consider the issues raised concerning the validity of the Secretary's regulations and remanded those issues, and any others remaining, for decision by the district judge who requested convocation of the three-judge panel. (J.S. No. 74-1302 App. A, p.2A; App. B, p.15A).

SUMMARY OF ARGUMENT

Part C of Title IV of the Coal Mine Health and Safety Act of 1969, as amended, is arbitrary, irrational and unfairly discriminatory legislation repugnant to coal mine

operators' rights to due process of law and equal protection of law under the Fifth Amendment to the Constitution.

1. The provisions of the Act imposing liability on mine operators to pay benefits to inactive miners who left the work force long before passage of the law constitute an unconstitutionally arbitrary and irrational legislative means for achieving the admittedly proper legislative goal of providing economic relief for such persons and their families. Singling out those members of the present mining industry who were the former employers of inactive miners to bear the burden of what Congress recognized to be a national obligation to this group of persons, can neither be justified as a workmen's compensation law, nor as a plan for exacting reparations for past wrongs not legally redressable at the time.

2. The eligibility of former and present coal mine employees for benefits under the Act is dictated substantially by statutory presumptions and other eligibility criteria governing the determination of disability due to occupational disease which render the law over-inclusive and lend it the characteristics of a pension law, not a workmen's compensation law. The law contains irrebuttable presumptions, and presumptions termed rebuttable which are not in fact fairly rebuttable, that result in the granting of benefits to persons who do not have an occupational disease or are not totally disabled by such a disease. Determining mine operator liability on the basis of these statutory presumptions violates their right to due process of law under the Fifth Amendment to the Constitution. The court below correctly recognized that to be so in the case of two of the presumptions erected in the statute, but erred in failing to consider plaintiffs' contention that certain other of the presumptions were not fairly rebuttable and resulted in a similar violation of their constitutional rights.

ARGUMENT

I.

THE OBLIGATION IMPOSED ON PLAINTIFFS BY TITLE IV TO PAY BENEFITS TO EX-MINERS OR THEIR SURVIVORS IS UNCONSTITUTIONALLY ARBITRARY AND IRRATIONAL.

The issue in this case is not whether it is permissible for Congress to create a program of financial relief for physically and economically disabled inactive coal miners and their families. Plaintiffs recognize that to be a legitimate object of the federal legislative power. The question before this Court is whether Congress chose an unconstitutionally arbitrary and unfair means to accomplish that end when it decided that particular mine operators were to bear the burden of financing this relief and that they were to be identified on the basis of their past employment relationships with individual claimants—many of which relationships terminated years, or even decades,[1] prior to passage of law.

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[1] For example, the Department of Labor has notified plaintiff Peabody Coal Company that initial determinations have been made that the company is responsible for paying benefits to two claimants who left mine work in the 1920's (M. Vinovich, SS# 322-20-1740, born 1898, left mines 1923; R. Horton SS# 432-10-4701, born 1903, left mines 1927), four claimants who left mining in 1930's (W. Watts, SS#332-01-7243, born 1904, left mines 1931; A. Libbey, SS# 354-10-9906, born 1899, left mines 1932; L. Francisco, SS# 348-07-6628, born 1881, left mines 1932; H. Pikey, SS# 342-03-2234, born 1912, left mines 1937), five claimants who left mining in the 1940's (O. Murer, SS# 306-03-8392, born 1910, left mines 1943; L. Williams, SS# 332-01-7748, born 1913, left mines 1946; J. Leach, SS# 332-01-9775, born 1881, left mines

(footnote continued on following page)

This Court has said that the Constitution's guarantee against arbitrary, irrational or unfairly discriminatory legislative acts, whether founded on principles of due process or equal protection of law, extends not only to legislative ends, but to the means by which those ends are achieved. See *James* v. *Strange*, 407 U.S. 128, 141 (1972); *Reed* v. *Reed*, 404 U.S. 71, 76 (1971); *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U.S. 405, 413 (1935).[2] These principles are applicable to federal legislation through the Due Process Clause of the Fifth Amendment, *Weinberger* v. *Wiesenfeld*, ... U.S. ....., 95 S. Ct. 1225, 1228 fn.2 (1975); *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). Recent decisions of this Court also suggest that the means by which legislative purposes are achieved should be made the subject of a meaningful judicial scrutiny when challenged as violative of these prin-

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1948; J. Nahas, SS# 344-03-4643, born 1900, left mines 1948; J. Villanucci, SS# 332-14-1872, born 1883, left mines 1948) and fourteen claimants who left mines in the 1950's (M. Arnold, SS# 509-05-5065, born 1909, left mines 1954; S. Ayers, SS# 401-01-3655, born 1905, left mines 1951; G. Sarver, SS# 342-03-5482, born 1905, left mines 1951; C. Campbell, SS# 327-18-4238, born 1904, left mines 1952; J. Warner, SS# 352-10-7201, born 1907, left mines 1952; C. Pennington, SS# 307-03-6192, born 1908, left mines 1953; V. Devos, SS# 343-10-9854, born 1909, left mines 1953; J. Kinder, SS# 233-24-4937, born 1921, left mines 1954; A. Smith, SS# 303-05-2658, born 1885, left mines 1954; L. Sennezy, SS# 344-03-6281, born 1889, left mines 1954; C. Purnell, SS# 355-09-2809, born 1911, left mines 1954; E. McCormick, SS# 322-01-5990, born 1894, left mines 1955; T. Hulsey, SS# 357-10-5001, born 1910, left mines 1956; E. Knuckles, SS# 401-24-9948, born 1922, left mines 1959).

[2] See generally, Gunther, *The Supreme Court/1971 Term/Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 23 (1972).

ciples, even though the legislation may not touch upon "fundamental" interests, or involve constitutionally "suspect" classifications. See *Stanton* v. *Stanton*, ... U.S. ....., 95 S.Ct. 1373, 1377 (1975); *Weinberger* v. *Wiesenfeld*, ... U.S. ....., 95 S. Ct. 1225 (1975); *James* v. *Strange*, 407 U.S. 128, 134, 141 (1972); *Reed* v. *Reed*, 404 U.S. 71, 76 (1971); *Eisenstadt* v. *Baird*, 405 U.S. 438, 448 (1972); *Weber* v. *Aetna Cas. & Surety Co.*, 406 U.S. 164, 170 (1972); *Cleveland Bd. of Education* v. *LaFleur*, 414 U.S. 632, 655 (1974) (concurring opinion of Mr. Justice Powell); *Frontiero* v. *Richardson*, 411 U.S. 677, 691 (1973) (concurring opinion of Mr. Justice Powell).[3]

Legislation that attaches new legal rights and duties to pre-enactment transactions, occurrences and conduct, as the legislation in question here does, long has been recognized as constitutionally suspect because of its great potential for violating the guarantee of fairness implicit in the Due

[3] In *James* v. *Strange*, for example, this Court found it unnecessary to consider whether a state statute allowing recoupment of counsel fees expended in an indigent's defense violated the fundamental constitutional right to counsel, and declared the law invalid on the basis that the classifications created did not bear a rational relationship to the admittedly legitimate purposes of the law. 407 U.S. at 134, 141, and in *Reed* v. *Reed*, this Court invalidated a classification based on sex as unrelated to the legislative purposes of a state law governing appointment of administrators of decedents' estates—without reference to "fundamental" interests, and recognizing that the object of the legislation had some legitimacy. 404 U.S. at 76. See also, *City of New York* v. *Richardson*, 473 F.2d 923, 930-31 (2d Cir. 1973); *Samuel* v. *University of Pittsburgh*, 375 F.Supp. 1119, 1132-34 (W.D. Pa. 1974); Gunther, Note 2 *supra* at 18-33.

Process Clauses of the Fifth and Fourteenth Amendments[4] and, consequently, plaintiffs submit, should be subjected to a scrutiny more careful than that demanded in the case of constitutional challenges to regulatory statutes not having that characteristic.

A proper examination of the relationship between the purposes of the legislation in question and the means devised by Congress to achieve those purposes would reveal the error of the district court's holding (J.S. No. 74-1302 App. A, p.6A) that the operator-liability provisions of Title IV represent a rational exercise of congressional powers. The constitutional vice of the black lung benefits law is that Congress has attempted to employ traditional workmen's compensation concepts and mechanisms to accomplish two very different ends: (1) to insure that men working in coal mines now and in the future will be compensated if they become disabled by coal workers' pneumoconiosis, and (2) to provide economic relief for large numbers of financially distressed ex-miners (and their families or survivors) who worked in coal mines in years past and did not have the benefit of workmen's compensation coverage of this nature. The first is an appropriate subject for compensation law, but the second is not.

[4] See generally: *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330, 350 (1935); *Nichols* v. *Coolidge*, 274 U.S. 531, 542 (1927); *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 554 (1949) (*dictum*); *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 315-16 (1945) (*dictum*); *Mora* v. *Mejias*, 223 F. 2d 814, 816, 819 (1st Cir. 1955); Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Calif. L. Rev. 216, 221-225 (1960); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 782, 791 (1936).

The early legislative history of Title IV clearly reflects a congressional belief that economic aid should be provided out of federal revenues for aging and disabled inactive mine workers and their families as a matter of national moral obligation.[5] The workmen's compensation provisions imposing liability on mine operators were added to the law on the eve of its enactment, virtually without congressional deliberation, and encompassed inactive, former mine workers as well as those presently in the work force.[6] It appears that this change was motivated by a desire to reduce the federal costs the law would entail, and that this was achieved merely by designating a cut-off date after which mine operators would be responsible for the claims of inactive miners as well as active miners on the theory that "industry" should bear the costs of benefits for its workers.[7] It is of controlling importance in this case, however, to recognize that the class singled out by this legislation

5 See discussion at pp. 6-14, *supra*.

6 See discussion at pp. 14-15, *supra*.

7 Senator Javits of New York explained that he had initiated the addition of these provisions in committee on the ". . . principle that industry should bear the cost of benefits for its injured and diseased workers." *1969 Legislative History* 1149. Subsequently he explained in hearings on proposed amendments in 1971, that ". . . I personally fashioned this compromise on workmen's compensation, to answer the fears of many of my colleagues, not those in the coal mining States, but the others who had to vote for what now has turned out to be a rather substantial federal liability in cost, and I I calmed many of their fears by the terminal date concept. . . ." *Hearings on S. 2675, S. 2289, H.R. 9212, Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st & 2d Sess. 135-36 (1972).

Ironically, in many instances this legislative "means" does not serve the legislative "end" of providing significant economic relief to inactive miners at all. Some 90 percent of inactive miner-claimants also receive Social Security benefits, *HEW Second Annual Report* Table 7. If their Title IV benefits were federally-financed, their black lung benefits would be in addition to these benefits. Act, section 412(b). Operator-financed benefit payments, however, would be offset against Social Security benefits as workmen's compensation payments. See *Richardson* v. *Belcher*, 404 U.S. 78 (1971). To a great extent, therefore, Part C does not further the Act's goal of providing *additional* relief to inactive miners, it merely shifts the burden of relief already being received away from the government and onto mine operators.

(footnote continued on following page)

to bear its economic burdens is not the coal mining industry, but those mine operators within the industry who happen to be former employers of the inactive miners who file claims.

Plaintiffs submit that there are only two possible explanations for Congress' choice of former employers as the class to bear the burden of paying benefits to inactive miners: (1) Congress may have thought that requiring these employers to pay benefits to their inactive former employees was justified by the same considerations that justify the obligations employers owe active employees under conventional workmen's compensation statutes; or (2) Congress may have felt that placing this obligation on former employers was justified as a "reparations" measure—that is, present legal redress for conduct in the past that was not unlawful at the time, but in hindsight is deemed to have been socially or morally culpable.

A. Viewed as a workmen's compensation law, Part C is irrational, and arbitrarily discriminatory.

The philosophy underlying workmen's compensation laws is that economic losses suffered by workers as a result of disabling disease and injury incurred in connection with their labor should be borne by the consumers of the prod-

ucts whose production was the occasion for their losses. Workmen's compensation laws achieve this result by transferring the loss from the worker to his employer, who is better capable of passing the loss on to consumers through the price of the product, along with his other costs of production.[8]

In addition to protecting workers against interruption of income, one of the primary objectives of workmen's compensation is to protect workers against the work-related injuries and diseases that cause such losses. Shifting the initial incidence of these losses to employers as a cost of production brings market forces to bear on relative economic efficiencies, which provides a powerful incentive for an employer to protect his employees against occupational hazards, because producers facing higher costs and lower profits due to poor safety records are competitively disadvantaged.[9]

Insurance plays a crucial and indispensable role in workmen's compensation programs. It serves to secure the payment of benefits to employees and provides a route whereby the cost of the compensation system is passed on to the consuming public in orderly fashion.[10] Workmen's com-

8 See generally: 1 Larson's Workmen's Compensation Law §2.20; PROSSER, *Law of Torts* 530-31 (4th Ed. 1971). Riesenfeld, *Modern Social Legislation* 137-140 (1950); National Comm'n on State Workmen's Compensation Laws, *Compendium on Workmen's Compensation* 21-25 (1973).

9 See *The Report of the National Commission on State Workmen's Compensation Laws* 38, 39, 87 (1972).

10 See generally, 1 Larson Note 8 *supra* at §2.70; 3 *id.* §§92 *et seq.*; Lenhoff, *Insurance Features of Workmen's Compensation Laws*, 29 Corn. L.Q. 176 (1943); Deposition of George F. Reall, National Council on Compensation Insurance, pp. 47-48, filed in the district court on February 25, 1974.

pensation insurance rates are established on the basis of estimates of the potential risk of loss due to workers' exposure to the hazards of work in a particular type of industry (or in many cases, in the employ of a particular producer within the industry), and individual premiums are calculated in terms of so many dollars per one hundred dollars of payroll.[11] Thus, a producer's compensation costs are a function of both the degree of hazard to which his employees are exposed and the numbers of them so exposed. Assuming that a producer's use of labor is economically efficient, and that through health and safety measures he has minimized the risk of employee injuries, then his compensation costs should rise and fall along with his level of production and, consequently, his revenues. If consumers won't buy his product when compensation costs are reflected in its price, and if he can't absorb those costs and still make a profit, then compensation mechanisms merely have facilitated a market judgment that his enterprise lacks economic utility.

In the case of Title IV, however, Congress has chosen these mechanisms as the means by which the costs of providing benefits to inactive miners will be imposed upon mine operators—just as though these costs arose out of losses incurred in connection with current mine production. Put to this use, compensation mechanisms cease to function rationally and become an arbitrary economic force.

Consider the example of an operator of an efficient, economically viable enterprise who is perfectly capable of bear-

11 See Reall Deposition, Note 10 *supra* at 9-14; *National Commission Report*, Note 9 *supra* at 93-98; Riesenfeld, Note 8 *supra* at 372,ff.

ing the workmen's compensation costs associated with the activity of his present employees in the current production of coal, and is perfectly capable of profitably selling that coal at an aggressively competitive price:

—the operator of this mine, however, might have been in the mining business for decades, while his competitor has not; his exposure to the claims of now inactive former employees, or their survivors, therefore, will be much greater than that of his competitor;

—at some time in the past he may have engaged in mining on a much larger scale and employed far greater numbers of miners than he does now, while his competitors have not;

—unlike his competitor, he may have acquired mining properties from other operators for whose inactive former employees he also would be held responsible under Title IV[12];

—his competitor's former employees might reside in areas where they can find other employment, while his might be concentrated in areas where mining employment has declined and no other work is available.[13]

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12 If he acquired surface mining properties after 1969 but prior to 1972, he would not even have been aware that he was assuming this obligation, because the Act did not originally impose liability on successor operators for the employees of prior operators of surface mines acquired after 1969. This obligation was added by the 1972 amendments. See Act, Section 422(i); 30 USC §932(i).

13 Under Title IV, inactive miners who are capable of working nevertheless are considered "totally disabled" and eligible for benefits if they cannot find coal mining employment or nonmining employment suitable to their age, education and experience in the immediate area of their residence. Act, Section 402(f); 30 USC §902(f).

In short, this mine operator could be faced with a potential claims liability completely disproportionate to the number of miners he currently employs—indeed, he could have more claims than he has employees. There is no way this operator can avert this potential liability through exercise of choice or modification of his conduct, as he is capable of doing in the case of his present work force. His competitor, unburdened by this liability, has the distinct advantage, even though both operators may employ the same number of miners in equally efficient and equally safe mining activities.

Since workmen's compensation insurance rates are established on a state-to-state basis,[14] these same forces can operate with an equal vengeance on the entire mining industry of a state. In a state where mining has been a major factor in the state's economy for many years and which now numbers among its population a great many former miners who cannot find suitable nonmining employment, mine operators will be confronted with compensation costs much higher than those of competing operators in states where mining is a new industry, even though the two states' industries may be competitive when measured in terms of the cost-efficiency of current production.

If there is a justification for Congress having chosen a scheme for the economic relief of inactive miners that results in such arbitrary discriminations among competing mine operators otherwise similarly situated, it must be sought somewhere other than in the principles and policies underlying conventional workmen's compensation mechanisms.

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14 See Reall deposition Note 10 *supra* at 6-8; Exhibit A.

B. Viewed as a reparations law, Part C is irrational, and arbitrarily discriminatory.

The legislative history of Title IV (discussed at pages 6-15 *supra*) leaves little doubt that Congress enacted the provisions of the law granting benefits to inactive miners and their families out of a conviction that relief in the form of reparations was owing these persons as a matter of national moral obligation, because of ". . . the utter failure of all of us, and that includes the industry, the medical profession, and the Government—particularly the Public Health Service—to recognize this disease . . .",[15] and because these persons

> . . . were mining coal for national consumption, and for an industry under intense Federal pressure to keep the cost of the fuel low. The entire Nation benefited from the use of the coal and its low cost. The entire Nation then, has an obligation to [these] miners . . .[16]

In this respect, the law embodies a philosophy strikingly similar to that expressed in proposals for payment of reparations to Japanese Americans, American Indians and Black Americans for past wrongs.[17] Congress rationally might have chosen as its means to finance these reparations to impose that entire burden directly on the public, as it

15 See p. 9, *supra*.

16 See p. 13, *supra*.

17 See, *e.g.* Rostow, *The Japanese American Cases—A Disaster*, 54 Yale L.J. 489, 533 (1945); *Otoe and Missouria Tribe of Indians* v. *United States*, 131 F. Supp. 265, 269, 272-73 (U.S.C.C. 1955) (discussing the purposes and policies underlying the Indian Claims Commission Act); Hughes, *Reparations for Blacks?*, 43 N.Y.U.L. Rev. 1063 (1968).

partially did in Part B of Title IV, or to impose it indirectly on the consumers of coal through a uniform exaction from the industry on the basis of size of payroll or production, which equitably could be passed on to consumers through pricing.

But, it bears repeating, Congress did not impose this liability on "the industry," it imposed it on individual mine operators according to certain past employment relationships. If the operator-liability provisions of Part C are to be justified as a device for financing economic relief to inactive miners by exacting the costs of the program from former employers whose conduct in the past, although lawful, is now considered to have been morally wrong, then these provisions are reasonable only to the extent that they impose their burden on the blameworthy alone. The operator-liability provisions of Part C are patently arbitrary and irrational in this respect.

Under the law, a mine operator is not singled out to bear the responsibility for paying benefits to any particular inactive miner-claimant (or claiming survivor) on the basis of evidence of irresponsible mining activity in the past, or evidence that he knowingly exposed his employees to hazards and failed to take heed of their need for protection, or any other considerations going to the question of the culpability of his past conduct.

The operator to be held responsible is singled out merely on the basis of the recentness of his employment relationship with the claimant and his financial ability to pay the benefits,[18] neither of which has anything at all to do

18 The statutory and regulatory provisions governing identification of "responsible operators" are set out in Section 422(h); 30 USC §932(h) of the Act and in Subpart D of Part 725, 20 C.F.R.

with the causes of the claimant's condition, much less any moral wrongdoing that might be associated therewith. An operator could be held responsible to a claimant who worked for several other operators in dusty and dangerous underground conditions for twenty or thirty years, while only having worked for him for a short time under completely healthful conditions; he could be held responsible to a claimant who has never worked for him at all, if he has acquired mining property from one of the claimant's former employers; or he could be held responsible solely because the claimant's more recent former employers have gone out of business, or are not able to pay benefits.

C. Summary.

Title IV represents a radical and constitutionally suspect departure from sound compensation theory. The theory of private reparations financing embodied in the law could become precedent for almost infinite permutations in legislative classification—of both those to bear the burden and those to gain the benefits of such laws. To plaintiffs' knowledge, neither Congress nor any state legislature has ever enacted an employer-financed workmen's compensation law that covered persons who had ceased to be workmen prior to the enactment of the law.

The constitutionality of early state workmen's compensation laws was upheld by this Court upon the basis of the Court's recognition of the principles of compensation theory described earlier in this discussion. See *New York Central R.R. Co.* v. *White*, 243 U.S. 188, 203-205 (1917); *Mountain Timber Co.* v. *Washington*, 243 U.S. 219, 244 (1917). The Court felt it of enough significance to note (in *New York Central*), that ". . . it [the law] has no

retrospective effect, and applies only to cases arising some months after its passage," 243 U.S. at 202, and (in *Mountain Timber*), that the law ". . . disturbed no vested rights, its effect being confined to regulating the relation of employer and employee in the hazardous occupations *in futuro*." 243 U.S. at 236.

Plaintiffs are aware of only one federal legislative parallel to the inactive-miner provisions of Title IV, and that is a provision in the Railroad Retirement Act of 1934 requiring railroads to finance pensions for workers who had retired within a year before enactment of the law. That provision was declared unconstitutional by this Court in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935).[19]

The court below erred in distinguishing *Alton* and upholding the statute on the basis that "the Court in *Alton* recognized a fundamental difference between compensation type laws which deal with existing rights and liabilities and the Act there under consideration which sought to impose 'a new incident, without reference to any existing obligation or legal liability' upon the employer-employee relationships," while the duties imposed on coal mine operators by Title IV are based on standards "sounding in

[19] Plaintiffs appreciate that the primary holding of the *Alton* case—that the Railroad Retirement Act as a whole was beyond Congress' powers under the Commerce Clause (Justices Roberts, Van Devanter, McReynolds, Sutherland and Butler for the majority; Chief Justice Hughes, and Justices Brandeis, Stone and Cardozo, dissenting)—has been severely criticized, along with many other decisions of that era, as representing a discredited judicial philosophy. But *Alton* was not a single issue case. Chief Justice Hughes, speaking for the four dissenters, agreed with the majority that the "retroactive" pension provision was ". . . arbitrary and beyond the power of Congress," 295 U.S. at 389, and plaintiffs are not aware that this unanimous view has lost its force.

tort." (J.S. No. 74-1302, App. A, p.5A) The sounder view was expressed in *Alton* by Chief Justice Hughes, who recognized that ". . . compensation and pension measures for employees rest upon similar considerations," 295 U.S. at 383, and that "the fundamental consideration which supports this type of legislation is that industry should take care of its human wastage, whether that is due to accident or age", 295 U.S. at 384, but who, nevertheless, agreed ". . . with the conclusion that the requirement that the carriers shall pay retiring allowances to [persons who left their employment prior to enactment of the law] is arbitrary and beyond the power of Congress". 295 U.S. at 389. Actually, compensation laws represent a public superimposition of rights and duties on the employer-employee relationship in lieu of rights and duties sounding in tort, see *New York Central R.R. Co.* v. *White*, 243 U.S. 188, 203 (1917); Cf. 1 Larson's Workmen's Compensation Law §2, and as such, should be considered no more or less quasi-contractual than a duty imposed by law to pay pensions to employees, and no less arbitrary when imposed after the employment relationship has ended.

II.

TITLE IV SUBJECTS PLAINTIFFS TO LIABILITY AS EMPLOYERS FOR DISEASES AND DISABILITIES THAT ARE NOT EMPLOYMENT RELATED, IN VIOLATION OF THEIR RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW.

Plaintiffs have shown in the discussion preceding, that, while Part C of Title IV of the Coal Mine Health and Safety Act is framed as a workmen's compensation law, it contains unconstitutionally arbitrary reparations features which represent a radical departure from compen-

sation theory. That is not the only respect in which the law is novel. Congress also has abandoned the principle that workmen's compensation ought to be paid only in connection with work-related disability. Under Title IV, mine operators not only may be held liable to active and inactive miners who are totally disabled by coal workers' pneumoconiosis—they also may be held liable to claimants who are totally disabled by nonwork-related respirable diseases, and to claimants whose respirable disease may or may not be work-related, but who, in any event, are not totally disabled by it.

A. Under Title IV, mine operators will be required to pay compensation to claimants whose diseases are not work-related.

Although the expressed purpose of Title IV is to provide for the payment of workmen's compensation benefits only to miners and the survivors of miners totally disabled *by pneumoconiosis arising out of employment in coal mines,* under the provisions of Title IV governing administrative determinations of cases of compensable disease and disability, it is *impossible for the agencies responsible for adjudicating claims to distinguish between claimants disabled by work-related pneumoconiosis, and those disabled by some other, nonwork-related respirable disease.*

Application of these provisions—the employment presumptions set out in section 411(c); 30 USC §921(c) and the diagnostic limitations set out in section 413(b); 30 USC §923(b)—to the adjudication of claims for benefits under Part C thus will result in the imposition of liability upon mine operators to pay benefits merely upon evidence of a former employment relationship and evidence of a respi-

rable disease, whether the disease arose out of that employment, or not.

1. *Background: what "coal worker's pneumoconiosis" is, and how it is diagnosed.*

Nonwork-related pulmonary diseases, such as emphysema and chronic bronchitis, for example, are common to the general population, coal miners included. Chronic bronchitis and emphysema appear in all walks of life, often to a severely disabling degree. Several studies have shown that chronic bronchitis exists in twenty to twenty-five per cent of adult males in the general population, and that eight to fifteen per cent of adult males exhibit abnormally high chronic airway obstruction. Studies of the lungs of autopsied adult males living in urban areas show that half of them demonstrate the anatomical lesion of emphysema, ten per cent to a severe degree. Approximately six per cent of all benefit awards under the Social Security disability program for the general public are for severe disability caused by these diseases.[20] To be distinguished from these diseases of the general population are those diseases associated with or caused by particular kinds of occupations. Coal worker's pneumoconiosis (CWP) is one such "occupational disease."

The term "pneumoconiosis" refers to "a fibrous induration of the lungs due to the irritation caused by the inhalation of dust incident to various occupations, such as coal mining, knife grinding, stone cutting, etc."[21] The term

[20] Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, 92nd Cong., 1st & 2nd Sess., *Hearings on S. 2675, S. 2289, H.R. 9212* 381 (Hereinafter cited: "*1972 Senate Hearings*").

[21] Stedman's Medical Dictionary 1264 (21st Ed. 1966).

is defined in section 402(b) of the Act, 30 USC §902(b) as ". . . a chronic dust disease of the lung arising out of employment in a coal mine." A more detailed definition of coal worker's pneumoconiosis is found in a United States Public Health Service study of the disease:[22]

> Coal pneumoconiosis is a distinct clinical entity that results from inhalation of coal mine dust. The clinical diagnosis is based on roentgenographic evidence of nodulation together with a history of long-term exposure to coal dust. Coal pneumoconiosis is classified into two forms: simple pneumoconiosis and complicated pneumoconiosis.

Simple coal worker's pneumoconiosis, unless far advanced, does not in itself produce recognizable pulmonary impairment. Complicated pneumoconiosis can cause disabling pulmonary impairment of a predominantly restrictive nature. Chronic bronchitis and emphysema, which, as noted above, are themselves capable of causing severe physical disability, do not constitute diseases to be designated as pneumoconiosis. Some miners with, and some without, pneumoconiosis, may also have, along with the general population, disabling chronic bronchitis or emphysema, or both, but these diseases are not caused by pneumoconiosis arising out of exposure to coal dust.[23]

Until 1969 there was little data available concerning the amounts of uncontrolled coal dust to which persons in various mining occupations typically were exposed, or what constituents, particle sizes, and concentrations of dust were

[22] Public Health Service, U.S. Dep't of Health, Ed. & Welfare, (Lainhart, Doyle, Enterline, Henschel & Kendrick) *Pneumoconiosis In Appalachian Bituminous Coal Miners* 3 (1969).

[23] *1972 Senate Hearings* 380-83.

hazardous. In fact, coal worker's pneumoconiosis was not generally recognized as a separate disease entity in the United States until the 1950's; prior to that time, it was thought to be a form of silicosis arising out of rock dust generated principally in the mining of anthracite coal.[24]

In 1969, in a report submitted to the Senate Committee on Labor and Public Welfare in connection with its consideration of the then-pending Coal Mine Health and Safety Act, the Department of Interior estimated that the average dust level in mines was 7 milligrams per cubic meter of air, and that reduction of that level to 2 milligrams would reduce the probability of a miner developing simple pneumoconiosis from a rate of 36% per 1000 miners after 35 years' exposure, to a rate of 2%.[25] Congress enacted this standard into law in Section 202 of the Act, 30 USC §842, which required that mines achieve a 3 milligram dust level within 6 months after enactment and a 2 milligram level by the end of 1972.

2. *The statutory presumptions set out in section 411(c) are not fairly rebuttable.*

In determining the eligibility for benefits of a claimant who has worked in coal mines for ten years or more, the defendant Secretary of Labor is required by section 411 (c) of the Act, 30 USC §921(c) to presume certain facts about the nature and cause of the claimant's physical condition.

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24 See generally, *Id.* at 572; Public Health Service, note 22 *supra* at 15-19.

25 S. Rep. No. 91-411, 91st Cong., 1st Sess. (1969), printed in *1969 Legislative History* 16-17.

If the claimant has "pneumoconiosis" (within the broad meaning given that term by regulations of the defendant Secretary of Health, Education and Welfare), the Secretary is to presume that the disease arose out of mine employment; if the claimant has worked fifteen years or more in underground mines, or a similar environment, and has a "totally disabling respiratory or pulmonary impairment" (again, within the broad definitions assigned to those terms by HEW regulations), the Secretary is to presume that his condition was caused by pneumoconiosis.[26] These presumptions govern the determinations of causation and disability to be made in connection with the claims of survivors of such miners, as well. A survivor of a miner who worked ten years in coal mines also is given the benefit of a presumption that the miner died "due to pneumoconiosis", if he died from any "respirable disease".[27]

These presumptions are termed "rebuttable" in the Act, and if that were true in fact, they would be less cause for concern—because they would only operate to shift to mine operators the burden of proving that a miner's disease was not work-related. The Act, however, mandates application of evidentiary standards and limitations in the adjudication of claims that effectively preclude a diagnostic distinction between work-related and nonwork-related respirable diseases, and consequently these presumptions are irrebuttable for all practical purposes.

Prior to 1972, claims for benefits under Title IV were processed and adjudicated according to the procedures utilized in determining entitlement to claims for disability

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26 Act, section 411(c)(1) and (4); 30 USC §921(c)(1), (4).

27 Act, section 411(c)(2); 30 USC §921(c)(2).

benefits under the Social Security Act, except that, unlike the Social Security disability program, it was necessary under Title IV to establish a causal connection between the claimant's respirable disease and exposure to dust in coal mining employment. [28] The Secretary of Health, Education and Welfare (who then was responsible for administering the program) recognized that this causal connection could be demonstrated only by x-ray diagnosis in the vast majority of cases, and promulgated regulations requiring such evidence to establish entitlement to benefits:

> Under Part B of Title IV, a miner is entitled to benefits if he is totally disabled due to pneumoconiosis. In line with this requirement, the regulations specify that, regardless of other impairments, total disability must be found to be caused by pneumoconiosis which is defined in the statute as a chronic dust disease of the lungs which has arisen out of employment in underground coal mines.
>
> To establish the causal or occupational connection with coal workers' pneumoconiosis, the regulations provide that there must be X-ray evidence of pneumoconiosis in the living applicant (in a rare case, a biopsy). This is based on the prevailing medical judgment that in the absence of positive X-ray evidence, the disease does not exist or exists to a degree that would have no significant effect on the claimant's functional capacity.
>
> There is some minority medical opinion to the effect that disabling pneumoconiosis may exist in the absence of "positive" X-ray evidence thereof. However, this issue was thoroughly considered by the

28 Act, section 413(b); 30 USC §923(b).

> Social Security Administration, through extensive consultation with a wide range of medical specialists, and the requirement was included in the regulations as reflecting the overwhelming consensus of medical judgment on the issue.[29]

Concern on the part of some over the high rate of claims denied because of lack of evidence of occupationally related pneumoconiosis resulted in a movement in 1971 to amend the Act to broaden its coverage to include "any respiratory or pulmonary diseases or impairments and their sequelae arising out of employment" in a coal mine, and to prohibit denial of claims solely on the basis of X-ray evidence that the claimant did not have pneumoconiosis.[30] The Secretary of HEW strongly opposed these changes in the law on the ground that it would be impossible to make medically valid determinations of total disability due to pneumoconiosis under them. In a formal appraisal of the proposals submitted at the request of the Senate Committee conducting hearings on the amendatory bills, he said:

> The overwhelming consensus of expert medical opinion is that when a good quality X-ray is classified negative for pneumoconiosis, the disease (if it exists at all) does not exist in the individual to a disabling degree, nor can any disabling lung impairment he may have be attributable to that disease. Therefore, when the X-ray is negative, there is a sound medical basis for determining that the individual is not totally disabled due to pneumoconiosis. Breathing tests are valuable

29 U.S. Dep't of Health, Education & Welfare, *First Annual Report on Part B of Title IV of the Federal Coal Mine Health and Safety Act of 1969* 18 (Printed by the House Committee on Education and Labor, June, 1971).

30 *1972 Senate Hearings* 1-21.

to determine whether an individual has a lung impairment, but they do not serve to identify the presence of pneumoconiosis as distinguished from other, nonwork-related, lung impairments.

Thus, if the Social Security Administration is prohibited from denying claims on the basis of a negative X-ray, it would be faced with a serious dilemma in making medically-valid determinations of total disability due to pneumoconiosis under the law.

Nor would this problem be ameliorated in any way by the provision . . . extending benefits to miners (and their widows) disabled from any other respiratory or pulmonary diseases or impairments arising out of employment in an underground coal mine. On the basis of present medical knowledge, there is no established causal connection between coal mine employment and any disabling lung disease other than coal workers' pneumoconiosis. Therefore, there would be no sound medical basis for finding miners eligible under this provision on the basis of any lung disease other than pneumoconiosis.

Miners, like many others in the general population, have breathing difficulty due to emphysema, chronic bronchitis or other respiratory disorders not causally related to mine employment. *To pay black lung benefits on the basis of nonoccupational diseases would be altogether inconsistent with the concept of occupational causality basic to the law.*[31]

The Secretary of Labor also opposed the changes:

> . . . concern over the X-ray test derives at least in part from a widespread misunderstanding about the scope of Title IV. When the Act became effective, many miners who were partially or totally disabled due to diseases other than "black lung" believed that they were eligible to receive Title IV benefits. In some cases, the disabling disease was a respiratory ailment, such as emphysema or chronic bronchitis. Such persons find it difficult to accept the determination, however valid medically, that their disabilities do not make them eligible for Title IV benefits, even though they may be as severely disabled as their counterparts suffering from pneumoconiosis. But Title IV is aimed at a specific and pervasive evil—the "black lung" disease. Pneumoconiosis is without question an occupational disease, and the concept of occupational causality is basic to Title IV. To expand Title IV to cover all respiratory and pulmonary impairments would confront the Social Security Administration with the task of verifying the work-related nature of such diseases, which, according to prevailing medical testimony, is impossible. This would be, we believe, a drastic and unwise change in the nature of the law.[32]

Extensive testimonial and documentary evidence was presented to Congress demonstrating the proposition that, according to the overwhelming consensus of expert medical opinion, coal workers' pneumoconiosis was the only respirable disease for which there was an established occupational relationship, and that it could only be diagnosed in the vast majority of cases by x-ray examination.[33] Proponents of the amendments, on the other hand, presented much evidence to show that respirable diseases other than coal worker's pneumoconiosis were prevalent in the mining population, but negligible medical evidence that such diseases were related to occupational exposure to dust, or that coal worker's pneumoconiosis could be diagnosed in the absence of x-ray evidence of the disease.[34] That the con-

31 *1972 Senate Hearings* 27-28 (Emphasis added).

32 *1972 Senate Hearings* 566-67.

33 See, *e.g.*, *1972 Senate Hearings* 375-385, 409, 442-450, 465-68, 552.

34 See, *e.g.*, *1972 Senate Hearings* 72, 115-129, 135, 138-141, 151, 165.

sensus of expert medical opinion was to the contrary was not seriously disputed.

Congress refused to amend the Act to expand the scope of its coverage to include respiratory impairments other than pneumoconiosis, but did add the following language to Section 413(b); 30 USC §923(b):

> . . . [N]o claim for benefits under this part shall be denied solely on the basis of the results of a chest roentgengram. In determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical tests such as blood gas studies, x-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials.

Since there is no practical way to diagnose respiratory impairment as work-related pneumoconiosis without x-ray evidence, notwithstanding the amendment's illusory prescription of other diagnostic methods, this language, whether by accident or intent, expands the eligibility standards of the Act to include other respiratory impairments as effectively as the rejected amendment would have.

The Secretary of HEW, as of course he must, has promulgated rules and regulations governing determinations of benefits eligibility which reflect the diagnostic principles embodied in this amendment,[35] making the "rebuttable" "irrebuttable" for all intents and purposes. Under these regulations, even if x-ray evidence (or biopsy, or

[35] 20 CFR Part 410, Subpart D.

autopsy) fails to establish the existence of pneumoconiosis, such a finding is justified if other relevant evidence establishes the existence of a totally disabling chronic respiratory or pulmonary impairment.[36]

"Other relevant evidence" includes:

> . . . medical tests such as blood gas studies, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the miner's physician, his spouse's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the individual's physical condition, and other supportive materials.[37]

Criteria for ventilatory studies (which are designed merely to show breathing capacity) are set out in the regulations[38] and medical specifications justifying a finding of total disability due to pneumoconiosis are set out in an Appendix to 20 CFR Part 410, Subpart D.

Application of these criteria and specifications, or the other "medically equivalent" tests permitted by the regulations,[39] unavoidably will result in the diagnosis of noncompensable, nonwork-related respiratory impairments as compensable pneumoconiosis.

In cases where the employment presumptions discussed above are applicable, not even the medical criteria and specifications in the regulations need be satisfied, and the regulations do not describe, recognize, or acknowledge any means whereby these presumptions might be rebutted.

[36] 20 CFR §§410.414(c), 410.454(c).
[37] 20 CFR §410.414(c).
[38] 20 CFR §§410.426(b), 410.430.
[39] 20 CFR §§410.424(b), 410.426(d).

3. ***Presumptions based upon duration of employment constitute arbitrary and irrational bases for the adjudication of claims for disability due to pneumoconiosis.***

Coal workers' pneumoconiosis is caused by breathing coal dust, and the likelihood of a miner developing it depends upon the concentrations of dust to which he is exposed and the length of time he is exposed to them. That Congress recognized these facts at the time it enacted the Coal Mine Health and Safety Act is reflected by its inclusion in the law of strict provisions for dust control in mines and provisions for the transfer of miners threatened with the disease to less dusty work areas.[40]

Not all mine work involves exposure to dust, yet the presumptions in question arbitrarily are based upon the number of years spent in mining employment rather than duration of exposure to coal dust. Even if there were some basis for assuming that exposure for a given time to the concentrations of coal dust that existed in mines prior to the institution of dust controls would cause the disease, it is irrational to assume that causal relationship with respect to exposure for the same length of time to far smaller concentrations of dust (see discussion at pp. 48-49, *supra*).

It cannot reasonably be assumed that all mine workers are exposed to the same dust conditions, but even if it could be, it still would not follow that they all are exposed to the same risk of disease after a given number of years of employment. In hearings on proposed amendments to the law held in February and March of 1975, the Departments of Labor and Health, Education and Welfare told

40 Act, sections 202, 203(b)(2); 30 USC §§842, 843(b)(2).

the House Subcommittee on Labor Standards that their agencies had found no medical evidence to support a conclusion that development of coal workers' pneumoconiosis in a miner could be related to duration of employment even for periods as long as 35 years.[41] Extensive studies conducted by the U.S. Public Health Service's Appalachian Laboratory for Occupational Disease reached the same conclusion, and that is the view of the American Lung Association.[42] Notwithstanding all of the foregoing, under the statutory presumptions in question, operating in combination with the diagnostic criteria mandated by the Act, a claimant may be awarded benefits for which a mine operator is liable merely because he has or had been employed in mining for a given number of years and suffers from a respiratory condition that is just as likely to be nonoccupational in origin.

B. Under Title IV, mine operators will be required to pay benefits to claimants who are not totally disabled by any disease.

Relaxation of the eligibility standards to a point where claimants physically disabled by nonwork-related respiratory impairments could qualify for benefits was not the only change made in the law in 1972. Congress also amended the definition of "total disability" in the Act to provide that ". . . a miner shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities

41 House Comm. on Education and Labor, Subcomm. on Labor Standards, 94th Cong., 1st Sess., *Hearings on H.R. 7, H.R. 8, H.R. 3333* (*"Black Lung Benefits Reform Act of 1975"*) pp. 127, 216.

42 *Id.* at 79-83; 106-114; 232.

comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time."[43]

This amendment was designed to make benefits available to former miners who are not actually physically incapable of gainful employment, but who cannot find employment "comparable" to that they once held in mining, because of age, lack of education, lack of experience, or the absence of such employment opportunities near where they live.[44]

The Secretary of HEW had opposed this change as introducing a principle into the law that was inconsistent with the philosophy of a workmen's compensation program:

> Under present law and regulations, a miner is considered "totally disabled" if he is unable, by reason of pneumoconiosis, to engage in any substantial gainful activity.
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> • • •
>
> It would appear most inappropriate to define total disability for all cases as inability to work as a miner, particularly where the individual is actually performing, or obviously has or has demonstrated the capacity to perform, nonmining work. As a workmen's compensation benefit, the black lung payment is designed to compensate for loss of earning power, *not as an indemnity or welfare payment.*[45]

The Secretary of Labor joined in this opposition.[46]

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43 Act, section 402(f); 30 USC §902(f).

44 See *1972 Senate Hearings* 3.

45 See *1972 Senate Hearings* 28-29 (Emphasis added).

46 *Id.* at 567.

Under the regulations which the Secretary of HEW was required to promulgate to implement this change in the law, a claimant who has a respiratory impairment presumed or found to be pneumoconiosis under the liberal standards discussed above, but who is not totally physically disabled even within the liberal medical criteria set out in the regulations, nevertheless will be entitled to benefits if he cannot do his previous coal mine work, and cannot find comparable work within the immediate area of his residence because of his age, lack of education or lack of experience.[47]

For example, in the great majority of the cases referred to at pages 30-31, footnote 1, *supra,* the claimant who had been found to be "disabled" by occupational disease by the Department of Labor, had indicated on his application that he left mining for reasons such as retirement, or to start his own business, or, most often, because the mine had closed,

C. Use of these arbitrary and irrational standards in the adjudication of claims under Part C will violate coal mine employers' rights to due process and equal protection of the law.

Plaintiffs' contention that Congress has created period-of-employment presumptions governing eligibility determinations that arbitrarily imbue cases of nonoccupational disease and disability with presumptive merit and hedged the claims determination process with medically invalid diagnostic limitations, demands factual resolution. This Court has said that statutory provisions that permit or compel inference of a fact from proof of another when

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47 20 CFR §§410.412(a)(1), 410.426(a).

there is no rational connection between the fact proved and the ultimate fact to be presumed therefrom, or that do not afford fair opportunity to rebut such presumptions even where a rational connection may exist, are forbidden by the Due Process clauses of the Fifth and Fourteenth Amendments because they amount to legislative arbitrariness. See, *e.g., Cleveland Bd. of Ed.* v. *LaFleur,* 414 U.S. 632, 644 (1974); *U.S. Dept. of Agriculture* v. *Murry,* 413 U.S. 508, 514 (1973); *Vlandis* v. *Kline,* 412 U.S. 441, 446 (1973); *Stanley* v. *Illinois,* 405 U.S. 645, 657 (1972); *Leary* v. *United States,* 395 U.S. 6, 31 (1969); *Tot* v. *United States,* 319 U.S. 463, 467 (1943); *Heiner* v. *Donnan,* 285 U.S. 312, 325 (1932); *Schlesinger* v. *Wisconsin,* 270 U.S. 230, 239-40 (1926).[48]

Leary v. *United States, supra,* which involved a criminal statute, is the leading case in this area because of its careful explanation of the governing law, and, as will be seen later, for the guidance it offers in resolving constitutional challenges to statutory presumptions. Speaking of *rebuttable* presumptions, this Court said:

> Early decisions of this Court set forth a number of different standards by which to measure the validity of statutory presumptions [Footnote omitted]. However in *Tot* v. *United States,* 319 U.S. 463 (1943), the Court singled out one of these tests as controlling, and the *Tot*

48 See also, *Andrews* v. *Drew Mun. Sch. Dist.,* 507 F. 2d 611, 614 (5th Cir. 1975); *Owens* v. *Roberts,* 377 F.Supp. 45, 52 (M.D. Fla. 1974); *Juster Bros.* v. *Cristgau,* 7 N.W.2d 501, 507 (Minn. 1943); *Carolene Milk Products Co.* v. *McLaughlin,* 5 N.E.2d 447, 450 (Ill. 1936). The case of *Owens* v. *Roberts, supra,* is especially pertinent to this case, because it involved a statutory presumption that was termed rebuttable, but in fact had been rendered irrebuttable by regulations promulgated under the statute. See 377 F.Supp. at 49-50.

> rule has been adhered to in the two subsequent cases in which the issue has been presented.
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> • • •
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> The Court, relying upon a prior decision in a civil case [Footnote omitted], held that the "controlling" test for determining the validity of a statutory presumption was "that there be a rational connection between the fact proved and the fact presumed." 319 U.S., at 467. [395 U.S. at 32-33]

More recently, this Court has cited the *Leary* case, among others, in striking down an *irrebuttable* civil statutory presumption concerning student residency for tuition purposes. *Vlandis* v. *Kline, supra.* The Court said in that case:

> Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments. In *Heiner* v. *Donnan,* 285 U.S. 312 (1932), the Court was faced with a constitutional challenge to a federal statute that created a conclusive presumption that gifts made within two years prior to the donor's death were made in contemplation of death, thus requiring payment by his estate of a higher tax. In holding that this irrefutable assumption was so arbitrary and unreasonable as to deprive the taxpayer of his property without due process of law, the Court stated that it had "held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Id.,* at 329. [412 U.S. at 446]

Plaintiffs contend that the presumptions in question in the case at bar are constitutionally vulnerable in each of the respects discussed above.

Congress may not, by legislative fiat, enact into existence facts that do not, and which cannot be made to, exist in actuality. See *Heiner* v. *Donnan,* 285 U.S. 312, 329 (1932).

The rationality of a statutory presumption, therefore, must be determined as a matter of fact. This Court said in the *Leary* case, *supra*, that in determining the rationality of presumptions dealing with matters not within specialized judicial competence or not completely commonplace, significant weight should be accorded the capacity of Congress to "amass the stuff of actual experience and cull conclusions from it"; but that, since such determinations are "empirical", courts must consider all relevant direct and circumstantial data. 395 U.S. at 38.

In *Leary*, this Court found that legislative history did not supply an adequate basis for determining whether it was rational to presume that a person possessing marijuana had knowledge of its origin, and consequently undertook to ascertain the factual rationality of the presumption from other data. Finding floor debates and committee reports unhelpful, the Court considered testimony given at committee hearings, written statements and documents submitted to the committees, published reports of federal and state agencies dealing with collateral matters, and even current periodicals and books. See 395 U.S. at 39-40.

The same sort of evidentiary inquiry is called for in the instant case. Legislative history, viewed in the light most favorable to defendants, affords little help in determining the rationality of the presumptions in question. If anything, it tends to demonstrate their irrationality. Congress considered the possibility that respiratory diseases other than pneumoconiosis might be occupationally related to coal dust exposure, and rejected proposals to amend the law to that effect. There is substantial medical evidence, however, (including evidence submitted to Congress by the Department of Health, Education and Welfare, and the

Department of Labor), showing that in actuality the law is not so limited. This internal inconsistency of purpose and effect is sufficient in itself to condemn Title IV as irrational.

As a consequence of this violation of their right to due process of law, mining employers arbitrarily are singled out as a class to bear the burden of providing economic relief in connection with diseases and disabilities that are not causally related to mining employment, in violation of their right to equal protection of law. Compare, *Stanley* v. *Illinois*, 405 U.S. 645, 658.

As noted earlier in this Brief, principles of equal protection of law implicit in the Due Process Clause of the Fifth Amendment require that federal legislative classifications must have a fair and substantial relation to the object of the legislation. See discussion at pp. 31-32, *supra*. Equal protection requires not only a nondiscriminatory application of the law within a burdened class, but that there be some rationality in the nature of the class singled out to bear the burden, and that it have some relevance to the law's purpose. *James* v. *Strange*, 407 U.S. 128, 140 (1972); *Rinaldi* v. *Yeager*, 384 U.S. 305, 308 (1966); *Schilb* v. *Kuebel*, 404 U.S. 357, 383 (1971) (Dissenting opinion of Mr. Justice Stewart); *Nashville C. & St. L. Ry.* v. *Walters*, 294 U.S. 405, 413, 429 (1935).

The clear and singular purpose of the law in question here is to compensate workers and their surviving relatives for economic loss suffered as a result of total disability by one occupational disease—pneumoconiosis. However, the law also singles out coal mining employers such as plaintiffs to bear the burden of compensating their employees for diseases that are *not* connected with employment, such as emphysema and chronic bronchitis, and for

"disabilities" *not* connected with occupational disease, such as the "disabilities" of age, lack of education, or lack of employment opportunities.

Imposing this obligation on employers is no more rational than imposing an obligation on them to provide economic relief to employees, their families and survivors financially distressed by any and all diseases and disabling accidents that they may encounter in life along with the general population, regardless of their occupation. Such logic equally would justify requiring employers to indemnify their employees for any economic loss, whatever its cause, for no reason other than that they are employees.

Absent some *nexus* between the mining employment relationship and the disabling diseases for which benefits are awarded, there is no justification for imposing the compensation burden only on a mining employer to the exclusion of any other nonmining employer or employers for whom the claimant may have worked prior to, or after, his mining employment. In fact, absent such *nexus*, any class of persons or businesses might, with equal reason, (or lack thereof) be designated to bear this burden. A law of which that can be said must be considered unconstitutionally arbitrary.

The court below recognized that two of the presumptions set out in the Act were arbitrary and unreasonable, and correctly concluded that their use in the adjudication of claims for which plaintiffs might be responsible would violate plaintiffs' right to due process of law. The district court held that the irrebuttable presumption in Section 411(c)(3) of the Act, 30 USC §921(c)(3), which ". . . not only involves a presumption of the existence of pneumoconiosis but forecloses all fact finding as to the effect of that disease upon a particular coal miner . . ." was a ". . . departure from the overall pattern of the Act which makes the existence of both the disease and disability two (2) separate factors which must be established before liability is imposed", and that to the extent ". . . that such presumption purports to making a finding of total disability in terms other than those provided by the Act as standards for total disability, it is unreasonable and arbitrary". (J.S. No. 74-1302 App. A, pp. 9A-10A).

The court reached the same conclusion with respect to the language in Section 411(c)(3) limiting the evidence that could be presented in rebuttal to a presumption of total disability to evidence that the miner did not have the disease at all, or did not contract it in connection with employment in a coal mine. The court noted that (1) Congress had made no finding that pneumoconiosis, *per se,* was disabling; (2) that it was irrational to require proof of absence of the disease in order to dispel a presumption of total disability from it, when the Act itself does not predicate liability on the mere existence of the disease; (3) that it was irrational to require rebuttal evidence that a miner's disease did not arise out of employment in *any* coal mine when the Act itself limits operator liability to disease arising, at least in part, out of *the operator's* coal mine, and (4) that it could find no basis upon which Congress could ". . . deprive a litigant of the right to produce whatever evidence may be admissible generally in attempting to rebut a presumption without offending due process." (J.S. No. 74-1302 App. A, pp. 11A-12A).

It would appear from a reading of the entire opinion below that the district court felt constrained to consider

the rationality of the presumptions set out in the Act only from the standpoint of their consistency within the terms of the Act itself. Thus, the court felt it sufficient to note with regard to plaintiffs' challenges to other presumptions in the law, that legislative history indicated there was some rational basis for them and that they simply served to shift the burden of proof. (J.S. No. 74-1302 App. A, pp. 8A-9A). The court acknowledged, but failed to address itself to, plaintiffs' contention that the mere labeling of a presumption as "rebuttable" should not foreclose examination of it to determine whether in fact it *is* fairly rebuttable. Plaintiffs submit that the district court erred in failing to undertake that inquiry.

Plaintiffs believe that there was sufficient evidence before the court on their motion for summary judgment to justify a finding that the so-called "rebuttable" presumptions in the Act were not in fact fairly rebuttable; that they operated to fix liability on mine operators in the unconstitutionally arbitrary fashion described above. That evidence was sufficient at least to show that a material issue of fact was in dispute that required resolution at trial. These were issues upon which findings of fact and conclusions of law should have been made. If judicial inquiry into issues of fact such as those raised by plaintiffs in this case is forbidden, then the Constitution's safeguards against arbitrary statutory presumptions and over-inclusive legislative definitions are illusory.

CONCLUSION

For the reasons stated herein, the judgment of the district court appealed from in Case No. 74-1302 should be affirmed; the judgment of the district court appealed from in Case No. 74-1316 should be reversed with directions to enter judgment for the plaintiffs for the relief demanded in their complaint; in the alternative, the judgment appealed from in Case No. 74-1316 should be vacated and the cause remanded for trial.

Respectfully submitted,

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August 8, 1975

APPENDIX

APPENDIX

TITLE IV OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

83 Stat. 742 (30 U.S.C. §901, *et seq.*), as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150.

TITLE IV — BLACK LUNG BENEFITS

Part A — General

Sec. 401; 30 USC §901:

Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease or who were totally disabled by this disease at the time of their deaths; and that few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents. It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease or who were totally disabled by this disease at the time of their deaths; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

Sec. 402; 30 USC §902:

For purposes of this title—

• • •

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(b) The term "pneumoconiosis" means a chronic dust disease of the lung arising out of employment in a coal mine.

(c) The term "Secretary" where used in part B means the Secretary of Health, Education, and Welfare, and where used in part C means the Secretary of Labor.

(d) The term "miner" means any individual who is or was employed in a coal mine.

• • •

(f) The term "total disability" has the meaning given it by regulations of the Secretary of Health, Education, and Welfare, except that such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time. Such regulations shall not provide more restrictive criteria than those applicable under section 423 (d) of Title 42.

• • •

Part B — Claims for Benefits Filed on or Before December 31, 1973

Sec. 411; 30 USC §921:

(a) The Secretary shall, in accordance with the provisions of this part, and the regulations promulgated by him under this part, make payments of benefits in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any miner whose death was due to pneumoconiosis or who at the time of his death was totally disabled by pneumoconiosis.

(b) The Secretary shall by regulation prescribe standards for determining for purposes of subsection (a) of this section whether a miner is totally disabled due to

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pneumoconiosis and for determining whether the death of a miner was due to pneumoconiosis. Regulations required by this subsection shall be promulgated and published in the Federal Register at the earliest practicable date after December 30, 1969, and in no event later than the end of the third month following December 1969. Final regulations required for implementation of any amendments to this subchapter shall be promulgated and published in the Federal Register at the earliest practicable date after the date of enactment of such amendments, and in no event later than the end of the fourth month following the month in which such amendments are enacted. Such regulations may be modified or additional regulations promulgated from time to time thereafter.

(c) For purposes of this section—

(1) If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment;

(2) If a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis;

(3) If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been

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made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be; and

(4) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's, his parent's, his brother's, his sister's, or his dependent's claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. In the case of a living miner, a wife's affidavit may not be used by itself to establish the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

(d) Nothing in subsection (c) of this section shall be deemed to affect the applicability of subsection (a) of this section in the case of a claim where the presumptions provided for therein are inapplicable.

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Sec. 413; 30 USC §923:

(a) Except as otherwise provided in section 414 [30 USC §924] of this title, no payment of benefits shall be made under this part except pursuant to a claim filed therefor on or before December 31, 1973, in such manner, in such form, and containing such information, as the Secretary shall by regulation prescribe.

(b) In carrying out the provisions of this part, the Secretary shall to the maximum extent feasible (and consistent with the provisions of this part) utilize the personnel and procedures he uses in determining entitlement to disability insurance benefit payments under section 423 of Title 42, but no claim for benefits under this part shall be denied solely on the basis of the results of a chest roentgenogram. In determining the validity of claims under this part, all relevant evidence sholl be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials. Claimants under this part shall be reimbursed for reasonable medical expenses incurred by them in establishing their claims. For purposes of determining total disability under this part, the provisions of subsections (a), (b), (c), (d), and (g) of section 421 of Title 42 shall be applicable. The provisions of sections 404, 405(a), (b), (d), (e), (f), (g), (h), (j), (k), and (l), 406, 407, and 408 of Title 42 shall be applicable under this part with respect to a miner, widow, child, parent, brother, sister or dependent, as if benefits under this part were benefits under subchapter II of chapter 7 of Title 42.

(c) No claim for benefits under this section shall be considered unless the claimant has also filed a claim under

the applicable State workmen's compensation law prior to or at the same time his claim was filed for benefits under this section; except that the foregoing provisions of this paragraph shall not apply in any case in which the filing of a claim under such law would clearly be futile because the period within which such a claim may be filed thereunder has expired or because pneumoconiosis is not compensable under such law, or in any other situation in which, in the opinion of the Secretary, the filing of a claim would clearly be futile.

Part C — Claims for Benefits After December 31, 1973

Sec. 421; 30 USC §931:

(a) On and after January 1, 1974, any claim for benefits for death or total disability due to pneumoconiosis shall be filed pursuant to the applicable State workmen's compensation law, except that during any period when miners or their surviving widows, children, parents, brothers, or sisters, as the case may be, are not covered by a State workmen's compensation law which provides adequate coverage for pneumoconiosis they shall be entitled to claim benefits under this part.

• • •

Sec. 422; 30 USC §932:

(a) During any period after December 31, 1973, in which a State workmen's compensation law is not included on the list published by the Secretary under section 931(b) of this title, the provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927), as amended (other than the provisions contained in sections 1, 2, 3, 4, 8, 9, 10, 12, 13, 29, 30, 31, 32, 33, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 51 thereof) shall (except as otherwise provided in this subsection and except as the Secretary shall by

regulation otherwise provide), be applicable to each operator of coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of employment in such mine. In administering this part, the Secretary is authorized to prescribe in the Federal Register such additional provisions, not inconsistent with those specifically excluded by this subsection, as he deems necessary to provide for the payment of benefits by such operator to persons entitled thereto as provided in this part and thereafter those provisions shall be applicable to such operator.

(b) During any such period each such operator shall be liable for and shall secure the payment of benefits, as provided in this section and section 423 [30 USC §933] of this title.

(c) Benefits shall be paid during such period by each such operator under this section to the categories of persons entitled to benefits under section 412(a) [30 USC §922(a)] of this title in accordance with the regulations of the Secretary and the Secretary of Health, Education, and Welfare applicable under this section: *Provided,* That, except as provided in subsection (i) of this section, no benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis which did not arise, at least in part, out of employment in a mine during the period when it was operated by such operator.

(d) Benefits payable under this section shall be paid on a monthly basis and, except as otherwise provided in this section, such payments shall be equal to the amounts specified in section 412(a) [30 USC §922(a)] of this title.

(e) No payment of benefits shall be required under this section:

(1) except pursuant to a claim filed therefor in such manner, in such form, and containing such information, as the Secretary shall by regulation prescribe;

(2) for any period prior to January 1, 1974; or

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(3) for any period after twelve years after December 30, 1969.

(f) (1) Any claim for benefits under this section shall be filed within three years of the discovery of total disability due to pneumoconiosis or, in the case of death due to pneumoconiosis, the date of such death.

(2) Any claim for benefits under this section in the case of a living miner filed on the basis of eligibility under section 411(c)(4) [30 USC §921(c)(4)] of this title, shall be filed within three years from the date of last exposed employment in a coal mine or, in the case of death from a respiratory or pulmonary impairment for which benefits would be payable under section 411(c)(4) [30 USC §921(c)(4)] of this title, incurred as the result of employment in a coal mine, shall be filed within fifteen years from the date of last exposed employment in a coal mine.

(g) The amount of benefits payable under this section shall be reduced, on a monthly or other appropriate basis, by the amount of any compensation received under or pursuant to any Federal or State workmen's compensation law because of death or disability due to pneumoconiosis.

(h) The regulations of the Secretary of Health, Education, and Welfare promulgated under section 411 [30 USC §921] of this title shall also be applicable to claims under this section. The Secretary of Labor shall by regulation establish standards, which may include appropriate presumptions, for determining whether pneumoconiosis arose out of employment in a particular coal mine or mines. The Secretary may also, by regulation, establish standards for apportioning liability for benefits under this subsection among more than one operator where such apportionment is appropriate.

(i) (1) During any period in which this section is applicable with respect to a coal mine an operator of such mine who, after December 30, 1969, acquired such mine or substantially all the assets thereof from a person (herein-

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after referred to in this paragraph as a "prior operator") who was an operator of such mine on or after the operative date of this subchapter shall be liable for and shall, in accordance with section 423 [30 USC §933] of this title, secure the payment of all benefits which would have been payable by the prior operator under this section with respect to miners previously employed in such mine if the acquisition had not occurred and the prior operator had continued to operate such mine.

(2) Nothing in this subsection shall relieve any prior operator of any liability under this section.

Sec. 430; 30 USC §940:

The amendments made by the Black Lung Benefits Act of 1972 to part B of this subchapter shall, to the extent appropriate, also apply to this part: *Provided,* That for the purpose of determining the applicability of the presumption established by section 411(c)(4) [30 USC §921(c)(4)] of this title to claims filed under this part, no period of employment after June 30, 1971, shall be considered in determining whether a miner was employed at least fifteen years in one or more underground mines.

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v.

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Appellees.

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On Appeals from the United States District Court for the Eastern District of Kentucky

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Appellants,

v.

JOHN T. DUNLOP, Secretary of Labor, and
CASPAR W. WEINBERGER, Secretary of Health,
Education, and Welfare,

Appellees.

On Appeals from the United States District Court for the Eastern District of Kentucky

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The United Mine Workers of America presents this brief in support of the government with the consent of counsel for all parties.

INTEREST OF AMICUS

The United Mine Workers of America is an international labor organization which represents more than 122,000 active and 90,000 retired coal miners within the United

States. Nearly 80 per cent of the working coal miners in the United States are members of the UMWA. The leadership and members of the UMWA were instrumental in securing passage of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. 91-173, 83 Stat. 744, as amended by the Black Lung Benefits Act of 1972, Pub. L. 93-303, 86 Stat. 150, 30 U.S.C. (Supp. II) § 901 *et seq.* In addition, the UMWA has been involved for many years in efforts to improve workers' compensation programs in the coalfield states and in securing compensation benefits for its members. See *United Mine Workers* v. *Illinois State Bar Assn.*, 389 U.S. 217 (1967).

The constitution of the UMWA International Union provides for a special compensation fund in each district supported by a uniform contribution paid out of the dues of all members.[1] In accordance with this constitutional provision, the UMWA employs or retains attorneys who represent thousands of members and their survivors on federal black lung claims and on state workers' compensation claims.

Ninety-seven per cent of all awards involving coal operator liability under Title IV of the Federal Coal Mine Health and Safety Act, as amended, have been contested by the particular operator who has been assigned liability.[2] Resolution of most of these contested claims is dependent upon the outcome of this case. Consequently, hanging in the balance as the operators' administrative appeals are pending is the

[1] Article XIII, Section 4, reads in part:

> "Such compensation trust fund money shall be expended in all Districts uniformly only for expenses incurred assisting members in obtaining unemployment and workmen's compensation benefits, including black lung payments and, where possible, in assisting widows and dependents of former members."

[2] Brief of Bituminous Coal Operators' Association, Inc., Amicus Curiae, at 6.

future economic security of hundreds of UMWA members and their families.[3]

The issues in this case go to the core of the scheme established by Congress to assure that benefits will be paid nationwide to coal miners who suffer from disabling lung disease caused by their occupation. The operators' appeal[4] raises questions about the Act's definition of total disability, the burden of proof in establishing occupationally related disability, and the scope of the coal industry's liability for compensating past victims of coal workers' pneumoconiosis. The government's appeal[5] seeks to establish the constitutionality of two sections of the Act that define the kind of evidence necessary to prove disability from pneumoconiosis. Unless this Court resolves these issues favorably to the Act's constitutionality, thousands of miners who are now disabled and thousands more who are still working will be unable to qualify for the compensation Congress intended to guarantee them. Thousands more will be required to undergo additional costly and arduous medical testing and protracted litigation in order to establish their claims.

The government will concentrate on defending the action of Congress and its own interests as administrator of the program Congress has established. The UMWA approaches the case as the representative of many of the miners, widows, and orphans who would be denied black lung benefits or who would encounter greater delay, expense, and discomfort in establishing their claims if this Court should fail to uphold the constitutionality of all sections of Title IV of the Act.

[3] Because of the slow and low rate of awards by the Department of Labor, this number now stands in the hundreds, but can be expected to rise to the thousands before this case is finally decided.

[4] *Turner Elkhorn Mining Co., et al.* v. *Dunlop*, No. 74-1316.

[5] *Dunlop* v. *Turner Elkhorn Mining Co., et al.*, No. 74-1302.

In addition, the UMWA recognizes that a decision by this Court holding any aspect of the federal black lung program unconstitutional could have a far-reaching and disruptive impact on state workers' compensation programs throughout the country. If the district court's decision on the constitutionality of § 411(c)(3) of the Act, 30 U.S.C. (Supp. II) § 921(c)(3), should be upheld, schedule benefits, dependency rules, and numerous other provisions of state workers' compensation laws would be called into question because they, in turn, could be analyzed as irrebuttable presumptions depriving employers of due process of law. If the operators should be successful in their challenge to other sections of the Act relating to the definition of disability and burden of proof, virtually no state workers' compensation award would be immune from constitutional attack. Furthermore, any decision striking down operator liability to compensate past victims of pneumoconiosis would interfere with the efforts of state legislature to provide compensation to the victims of all slow-to-be-revealed occupational diseases.

Underground coal mining causes a higher rate of occupationally related injury than any other major industry in this country.[6] As a result, coal miners and their union are grimly and inevitably concerned with the eligibility rules and procedures of state and federal compensation programs. The UMWA submits this brief amicus curiae in order to assure that the industrial context of this case as well as its broader ramifications for the present and future of the federal black lung program are fully presented to the Court.

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[6] National Safety Council, *Accident Facts* 26 (1974). Underground coal miners suffer 35.44 disabling injuries per million worker hours as compared with 10.55 disabling injuries per million worker hours for industrial workers generally.

SUMMARY OF ARGUMENT

The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801, *et seq.*, established a rational scheme, consistent with the requirements of due process, for providing compensation to miners disabled by pneumoconiosis in the past. The liability of coal operators for a small number of claims of former employees who left the mines before the Act was passed does not place any substantial or irrational economic burden upon them. Furthermore, the operators themselves are primarily responsible for the failure of eligible miners to apply for black lung benefits payable from public funds, since the operators alone knew the identity of their former employees and could and should have notified them of the federal program.

The three rebuttable presumptions contained in § 411(c) of the Act, 30 U.S.C. (Supp. II) § 921(c), represent a fair and rational legislative response to the inadequacy of past medical records and the limitations of all known medical techniques for the positive diagnosis of pneumoconiosis. These presumptions help to prevent the miner or his survivors from being prejudiced in his claim by the very failures of the coal mining industry and medical science that the Act is now attempting to remedy.

Section 411(c)(3) of the Act, which compensates all miners who suffer from complicated pneumoconiosis, represents a reasonable legislative response to medical testimony that complicated pneumoconiosis is a devastating, progressive disease that is ordinarily disabling and that significantly shortens a miner's life expectancy. Section 411(c)(3) thus forms an integral part of the overall congressional scheme of providing benefits to miners who are totally disabled by pneumoconiosis. Judged by the criteria set forth in *Salfi* v. *Weinberger*, —— U.S. ——, 43 U.S.L.W. 4985 (1975), this section is plainly consistent with the coal operators' right to due process of law.

I. THE OPERATORS' LIABILITY TO PAY BENEFITS TO CERTAIN CATEGORIES OF MINERS WHO STOPPED WORKING IN THE MINES BEFORE PASSAGE OF THE ACT IS A RATIONAL ASPECT OF A RATIONAL CONGRESSIONAL SCHEME.

The operators argue that the Federal Coal Mine Health and Safety Act, as amended, deprives them of due process of law because it arbitrarily and irrationally requires coal operators to pay benefits to former employees who left coal mine employment prior to passage of the Act.

In evaluating the rationality of the scheme Congress adopted for providing benefits to miners disabled in the past, it is essential to keep in mind the complexity of the problem Congress set out to solve. Congress was undertaking to provide benefits to the victims of a disease that had existed for years, had caused devastating illness and widespread suffering, but had only recently been identified in this country as a disease caused by the coal miner's occupation. In deciding to compensate the innocent victims of this disease, Congress was faced with the difficulty of reconciling the just claims of the suffering miner or his survivors with the obligations and rights of the energy-consuming public and the obligations and rights of the coal producers in a program that would be administratively workable. If some neat and simple solution existed, the many fine thinkers who turned their attention to the matter would have found it. Congress deliberated at length before passage of the Act and gave further attention to ways of devising an equitable system for providing black lung benefits in additional hearings following passage of the original Act in 1969.

Whether Congress had the *power* to tackle this difficult problem is not a question presented by this case.[7] Nor do

[7] *National Independent Coal Operator's Assn.* v. *Brennan*, 372 F. Supp. 16 (D.D.C. 1974), *aff'd*, 419 U.S. 955 (1974). See also Consolidated Brief for Turner Elkhorn Mining Co., *et al.*, at 30 (hereinafter "Turner Elkhorn Brief").

the operators complain of their liability for the claims of miners who worked for long years before December 30, 1969, but had some period of coal mine employment after that date.[8] The only issue here is whether the program adopted by Congress for allocating financial responsibility for miners who left coal mining before December 30, 1969, and who filed claims after June 30, 1973, is so irrational and arbitrary as to deprive the operators of due process of law.

A. The operators bear primary responsibility for the failure of their former employees to file for benefits payable from the public treasury.

Congress established a rational and workable scheme that explicitly recognized and provided for the compensation of miners and survivors of miners who had left coal mine employment before passage of the Act. As the operators acknowledge, Congress took great pains to create a program that would *not* place upon the industry the primary burden for compensating miners disabled in the past.[9] Congress specified a three-and-one-half year period (December 30, 1969, through June 30, 1973) for the filing of claims that would be the full and permanent responsibility of the American public payable from the U.S. Treasury. More than 550,000 miners and miners' survivors applied for benefits during that period[10] and more than 336,000 of those claims have been awarded so far.[11] If the coal operators are now complaining about their liability to miners who re-

[8] Turner Elkhorn Brief 33.

[9] Appellant's Jurisdictional Statement, No. 74-1316, at 15-16 n.7. See also Turner Elkhorn Brief 40.

[10] Statement of James B. Cardwell before the Subcommittee on Labor Standards of the House Committee on Education and Labor, 94th Cong., 1st Sess. (March 6, 1975).

[11] E. Clague, *Determining eligibility for black-lung compensation*, 97 Monthly Labor Rev. 25, 29 (March 1974).

tired before December 30, 1969, but did not apply for benefits until after June 30, 1973, they have no one to blame but themselves.

The operators were in sole possession of the information necessary to notify their former employees of the opportunity to apply for benefits under the federally-funded black lung program. In recent Congressional hearings, Bernard Popick, then director of the Social Security Administration's Bureau of Disability Insurance, testified that "the Social Security Administration undertook a very comprehensive and large-scale effort" to notify former miners and miners' survivors throughout the country of the availability of black lung benefits.[12] Mr. Popick explained that Social Security had been unable to give individual notice of the existence of the black lung program to every former coal miner or miner's survivor "because we have no way to identify on our own the people who would meet the requirements of the law or who would ever meet the requirement of coal mining employment, as specified under law."[13] The only complete record of those names, he explained, would be with the coal operators. A number of operators evidently recognized this and asked Social Security "to identify from a list of their former employees those who had filed claims with us."[14] According to Mr. Popick, these operators then undertook to advise all their former employees to file claims before the July 1, 1973, deadline:

> "They then took the list of names of people they understood not to have filed claims and got in touch with them or told them to get in touch with us to file a claim."[15]

[12] Hearings before the General Subcommittee on Labor, House Committee on Education and Labor, on H.R. 3476, 93d Cong., 2d Sess., 371.

[13] *Id.* at 372.

[14] *Id.* at 371.

[15] *Id.* at 372.

There is no evidence that any of the plaintiffs in this action ever made such an effort.

A miner or miner's survivor had every reason to file a claim before jurisdiction passed from the Social Security Administration to the Department of Labor. Claims filed before July 1, 1973, were judged under the more liberal "interim standards" contained in 20 C.F.R. § 410.490 rather than the stricter permanent medical criteria of 20 C.F.R. § 410.412 ff., used to evaluate claims filed after June 30, 1973.[16] Claims filed after that date are subjected to an adversary adjudication process in which the potentially liable coal operator is entitled to contest any award, whereas claims filed before that date are decided under Social Security's non-adversary administrative procedures.[17] Miners who established claims under Social Security's black lung program are entitled to lifetime benefits (assuming their continuing eligibility) and are deemed to have filed a protective application to assure payments for their surviving dependents after their death; in contrast, claims filed after June 30, 1973, may be payable only through December 31, 1981.[18] Disabled miners who filed claims before July 1, 1973, can draw full federal black lung benefits together with full Social Security disability benefits, whereas miners who filed claims after that date were subject, after Decem-

[16] Compare the 21.6 per cent approval rate under the Department of Labor program with Social Security's more than 60 per cent approval rate. Clague, *supra*, n. 11, at 27; U.S. Dept. of Labor, Black Lung Benefits Act of 1972: First Annual Report on Administration of the Act during the Calendar Year 1974 and the Transitional Period in the Second Half of 1973, at 1 (May 1975).

[17] Compare § 413(b) of the Act with §§ 415(a)(4) and 422.

[18] The uncertainty about the interpretation of § 422(e) is explained in Turner Elkhorn's Brief 19 n.16.

ber 31, 1973, to having their disability benefits reduced on account of receipt of black lung benefits.[19]

For all these reasons, it is highly unlikely that a former miner who was aware of the federal black lung program would have had any interest in postponing his application until after June 30, 1973.[20] Accordingly, miners who left coal mine employment before December 30, 1969, but who applied for benefits after June 30, 1973, must fall into one of three categories: (1) miners who qualified for benefits from Social Security and are attempting to establish simultaneous entitlement under the Department of Labor program; (2) miners whose claims were denied by Social Security and who are attempting to establish eligibility under the Department of Labor program instead; and (3) miners who were not adequately informed of their right to apply for benefits until after June 30, 1973. No miner in any of these categories can receive approval unless he shows that

[19] Section 412(b) of the Act provides that benefits paid for claims filed before July 1, 1973, shall not be considered workmen's compensation benefits for the purposes of the offset provisions of § 224 of the Social Security Act, 42 U.S.C. § 424. There is no corresponding protection for benefits paid after December 31, 1973, to miners who applied after July 1, 1973.

[20] For certain very limited classes of claimants there are advantages to the Part C program. For employed persons there is no earnings offset corresponding to the earnings offset for Part B claimants contained in § 412(b). Workmen's compensation benefits for injuries unrelated to pneumoconiosis are not subtracted from Part C claims, as they are from Part B claims. Compare § 412(b) with § 422(g). Medical treatment benefits are provided to Part C beneficiaries but not to Part B beneficiaries. § 422(g). However, these advantages are maximized by establishing simultaneous entitlement under both Parts B and C. Absolutely no advantage could be gained by failure to file a Part B claim.

he applied within three years of the date he discovered he was totally disabled by pneumoconiosis.[21]

The number of miners in the first category is some fraction of the approximately 3,000 claims filed by miners who qualified for benefits under the Social Security program.[22] A very substantial number of those claims have been or will be denied as a result of the more rigorous medical and adjudicatory standards of the Department of Labor program.[23] Miners who retired before December 30, 1969, will be a disproportionately large segment of the denials since they are not accorded the § 411(c)(4) presumption that respiratory disability is caused by pneumoconiosis if the miner has more than 15 years' coal mine employment.[24] Thus, at most, there will be several hundred miners in this category in the entire industry, of whom few, if any, will be former employees of plaintiffs. Furthermore, the opera-

[21] Section 422(f)(1). As the government describes, the Act was intended to provide enough flexibility in its statute of limitations to allow for the claims of miners in whom the disease became disabling only several years after they left coal mine employment. Hence, theoretically, there could be a category of miners who retired before December 30, 1969, but who had no idea they were disabled until after June 30, 1973. As a practical matter, however, these miners fall within category (3), for they did not have sufficient notice of their rights. That is because any retired miner who suspected his exposure to coal dust might have caused pneumoconiosis had every reason to apply before July 1, 1973, since at that time a miner could qualify for benefits solely on the basis of X-ray proof of pneumoconiosis at any stage. 20 C.F.R. § 410.490.

[22] As of August 1975, according to information supplied to the UMWA by the Department of Labor, 2,891 refilings had been received. Because of the statute of limitations in § 422(f)(1), only a limited number of possibly valid additional claims can be expected.

[23] See n.16, *supra*.

[24] Section 422(f)(2) provides that, in Part C claims, miners who do not apply within three years of last exposure to coal dust cannot have the benefit of the presumption contained in § 411(c)(4).

tors will not even bear full financial responsibility for these claims, but only for any additional benefits payable under the Part C program.[25]

The number of claims awarded in the second category—miners whose claims were denied by Social Security—will be negligible for miners who retired before December 30, 1969. In no way are the Department of Labor's adjudicatory criteria more liberal than the Social Security criteria; as noted, in law and in practice the Department of Labor criteria are far more restrictive. Consequently, approval by the Department of Labor of any claim of a miner who retired before December 30, 1969, and who was denied by Social Security would be an administrative fluke.[26]

It follows that, if the operators become liable for any substantial number of claims of miners who left employment prior to December 30, 1969, the liability will be for miners who were unaware of their opportunity to apply for black lung benefits before July 1, 1973. If there was a flaw in the statutory scheme, it was not that Congress created operator liability for some small number of claims of miners who retired before the Act's passage, but rather that Congress failed to place upon the operators—who had sole knowledge of the identity of their former employees—the mandatory duty to notify all their former employees of the opportunity to apply for benefits under Part B of Title IV of the Act. It would have been far better for all concerned if the operators had recognized their own economic interest in paying the costs of mailing notices about the availability of federal black lung benefits to all their former employees before July 1, 1973, rather than investing instead in the costs of this litigation.

[25] A miner who establishes simultaneous entitlement to Part B and C benefits does not forfeit his Part B claim. Rather full Part B benefits continue. Since Part C benefits are offset by any Part B benefits received, under the provisions of § 422(g), the operator is liable only for any medical treatment for respiratory disease, and, in an occasional claim, for partial benefits due to the different offset provisions (see nn. 19 and 20, *supra*.

[26] The only exception would be the rare case where pneumoconiosis dramatically progressed after Social Security denied the claim. In such cases the miner's pneumoconiosis would ordinarily have to show up on an X-ray for the first time after June 30, 1973, and he would have to have as well a very sharp decline in pulmonary function test scores.

B. The operators' liability for the claims of certain former employees does not create any substantial economic hardship.

The operators contend that their liability for benefits to former employees places an arbitrary and irrational burden on them, but they have failed to demonstrate that the burden has any weight or substance. The posture in which this case has been litigated—divorced from any actual imposition of the liability about which the operators complain—lends itself to the hypothetical, even fictional, concerns that pervade the operators' briefs and pleadings.[27]

Over the entire industry the total number of claims awarded by the Department of Labor to miners who left coal mine work before December 30, 1969, cannot conceivably be more than a few thousand, and very probably

[27] A notable example is the affidavit of J. Huell Briscoe (App. 31-35), on which the operators rely as a statement of their liability under Part C. Mr. Briscoe comes up with the fantastic figure of $2,236,246,-588 as the amount of the coal industry's liability for medical benefits to former miners. He bases his estimate on a prediction that the average medical costs per claim will be $12,216. Perhaps Mr. Briscoe did not realize that medical benefits are payable only for conditions related to pneumoconiosis. Considering the number of other third-party payment sources available to disabled miners, it is impossible to imagine these miners charging to their black lung medical card an *average* medical bill of $12,216 for respiratory disease treatment alone between now and 1981, or even during their entire lifetimes. Furthermore, with no explanation or documentation, Mr. Briscoe estimates coal operator liability for 155,600 "former miners" (a term he does not define) by counting claims filed (rather than awarded) and by predicting operator liability for 130,600 Part B claimants. As demonstrated, there is no likelihood that more than 3,000 miners employed before December 1969 will be eligible for medical treatment benefits chargeable to the operator, that is, 1/50 of the claims estimated by Mr. Briscoe.

will be less.[28] There is no showing in the record of this case that any of the named plaintiffs except one has incurred or will incur liability for *any* claims of miners who retired before December 30, 1969. Nor is there a showing that any single coal operator will be liable for more than a few dozen such claims. The only specific mention of actual liability is a listing of 25 claims for which Peabody Coal Company—the nation's largest—has been initially determined to be liable.[29] Even those 25 claims do not represent final determinations, since they were awarded subject to Peabody's right to contest liability. If the largest coal company in the country lists only 25 cases of potential liability two years after the program has begun, it is most difficult to sympathize with the operators' assertion that a significant burden is involved.

Average monthly benefit payments to a miner or his survivor under the Part C black lung program are $268.04.[30] That amounts to about $3,200 annually. Even if Peabody or some other operator were assigned total liability for as many as 25 claims of miners who retired before December 30, 1969, its responsibility for payments over a one-year period would be $80,000.[31] That is a minimal amount compared with coal company budgets, compared with coal company liability for state workmen's compensation payments, and compared with coal company profits.

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[28] See Part IA, *supra*.

[29] Turner Elkhorn Brief 30 n.1.

[30] U.S. Dept. of Labor, Black Lung Benefits Act of 1972: First Annual Report on Administration of the Act during the Calendar Year 1974 and the Transitional Period in the Second Half of 1973, at 11 (May 1975).

[31] The operator would be liable for some additional amount of medical treatment benefits. There is not yet sufficient experience with the medical treatment program to make an accurate assessment of the liability it will create. The amount is not likely to be large, however, since most beneficiaries will have one or more third-party payment sources for these costs, and the benefits are limited to treatment for conditions arising from the miner's pneumoconiosis.

Plaintiffs allege in their complaint that their combined coal production is 134,300,000 tons per year.[32] Steam coal is currently priced on the open market at more than $15 per ton. At that rate, the sale of coal alone will net plaintiffs more than 2 billion, 14 million dollars annually.[33] For companies doing that volume of business it is highly doubtful that the claims of a few hundred miners could be a burden of any significance at all.

Moreover, compared to the total worker's compensation liability of coal companies, this liability imposes no additional substantial burden. The coal companies complain, and it is true, that they must pay high rates to insure against their state and federal compensation liability. Coal mining is the nation's most dangerous industry, and coal company compensation rates reflect that fact.[34] But the high rates do not result from their responsibility for federal black lung benefits. In fact, in Kentucky, where this action arose, there has been no increase whatever in the insurance rates for underground coal mines attributable to liability for federal black lung payments.[35] In other coal mining states the rates have been raised, but not signicantly.[36] If insurance

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[32] App. 18.

[33] Steam coal is the coal burned by utilities. This estimate is based on the most recent monthly report of the Federal Power Commission, which reported prices for April 1975. The estimate has been adjusted to represent the FOB mine price. Metallurgical coal is priced at more than $35 per ton. Federal Power Commission, Monthly Fuel Cost and Quality Information (Aug. 7, 1975).

[34] In West Virginia, for example, underground coal mines are classified A-1 and the base rate of payments to the West Virginia Workmen's Fund is the highest of any industry. See West Virginia Workmen's Compensation Fund, Annual Report for Year Ending June 30, 1974 (1975), Table 19.

[35] Statement of William Vieweg, Chief, Technical Service Branch, Division of Coal Mine Workers' Compensation, U.S. Dept. of Labor, Hearings on H.R. 3476, *supra*, n.12, at 326. See also *id.* (letter from Nancy Snyder, Associate Director, Division of Coal Mine Workers' Compensation, U.S. Dept. of Labor).

[36] Hearings on H.R. 3476, *supra*, n.12, at 325-26.

companies expected to incur any substantial additional costs on account of the federal black lung program, they would certainly adjust their rates to reflect it.

Finally, a look at the profits of some of the named plaintiffs indicates that this kind of liability is not about to put them out of business. The profits listed in note 37 are for 1974, the year when the operators became liable for Part C benefits and were required by law to have purchased insurance to cover that liability. They are compared with the operators' profits in 1973, when liability and the responsibility to purchase insurance coverage had not yet begun. It is indeed difficult to take seriously the claim of a company that it has been irrationally disadvantaged when it showed a 313 per cent increase in profits in a recession year.[37]

The operators have based their argument of irrationality upon the "philosophy underlying workmen's compensation laws"—the philosophy that the costs of occupationally-caused injury and disease should be reflected in the price of the product and passed on to the consumer.[38] Today, however, coal prices do not equal production costs plus a cut-throat margin of profit. Instead, they rise and fall in response to price changes in alternative energy sources, particularly oil.[39] Moreover, the margin of profit for the plaintiff coal companies is so large that the minor degree of liability imposed by the Act will have no impact at all on their competitive advantage and will not make a difference in the price of coal. Far from being irrational, an Act that compensates men who built the coal industry with some small part of the windfall profits the industry is now enjoying is both socially and economically rational.

[37] The UMWA Research Department, on the basis of company annual reports, SEC Form 10-K, and Moody's Investors Service, Industrial Manual (1975), prepared the following chart:

Company	1974 profits (in millions)	1973 profits (in millions)	% change in profits
Peabody	29.3	7.1	+ 313%
Old Ben	21.35	8.5	+ 155%
Carbon Fuel	14.3	2.4	+ 498%
Valley Camp	4.9	2.4	+ 104%

[38] Turner Elkhorn Brief 35.

[39] Mitre Corporation, *Analysis of Steam Coal Sales and Purchases* (prepared for the Federal Energy Administration Office of Coal) 9-18 (April 1975).

II. THE REBUTTABLE PRESUMPTIONS CONTAINED IN § 411(c) WERE AN APPROPRIATE AND NECESSARY LEGISLATIVE RESPONSE TO THE INADEQUACY OF RECORDS FROM THE PAST AND THE IMPERFECTNESS OF ALL KNOWN MEDICAL TECHNIQUES FOR POSITIVE DIAGNOSIS OF PNEUMOCONIOSIS DURING LIFE.

The wisdom of the presumptions enacted by Congress in §§ 411(c)(1), (c)(2), and (c)(4) of the Act is not, of course, an issue to be considered by this Court.[40] It is neither constitutionally required nor appropriate for this Court to become involved in the complex and highly controversial medical debate over the etiology and diagnosis of coal workers' pneumoconiosis. Nevertheless, the operators attempt to involve the Court in that debate and, in the course of their effort, raise so many spurious or medically discredited arguments that some setting straight of the record is in order.

All three of the presumptions go to the issue of causation. Section 411(c)(1) establishes a rebuttable presumption that the pneumoconiosis of a miner who worked 10 or more years in a coal mine was caused by his coal mine employ-

[40] The operators also attack the prohibition in § 413(b) against denying claims solely on the basis of a negative X-ray. The court below upheld that provision without discussion. The UMWA likewise feels that the attack is not substantial enough to require a reply. Furthermore, the discussion of the unreliability of X-ray evidence, *infra*, which demonstrates the rationality of § 411(c)(4), applies as well to § 413(b).

ment. Under § 411(c)(2), there is a rebuttable presumption that a miner who worked 10 or more years in a coal mine and died from a respirable disease, died from pneumoconiosis. And § 411(c)(4) creates a rebuttable presumption that a miner who worked 15 or more years in a coal mine and who is or was totally disabled by a respiratory impairment, is or was disabled by pneumoconiosis.

The operators piously argue that it would be more rational to base these presumptions upon total exposure to coal dust than upon years of coal mine employment.[41] Of course it would! But where does the fault lie for the unfortunate fact that this is impossible? There are no lifetime records of coal dust exposure for most miners because the coal mining industry did not keep such records. Just in the past three or four years have such records begun to be kept for the mining population as a whole, and only as a result of the very Act whose irrationality the operators now attack.[42] It is the very lack of exposure data—the miner or his survivors are utterly unable to locate objective proof of the miner's exposure to respirable dust—that makes the presumptions based on years of service necessary.

The first presumption amounts to little more than a tautology: If the miner proves that he is totally disabled by pneumoconiosis, a disease defined as being occupationally-caused,[43] the law will presume that his occupation caused his disease. No genuine shifting of the burden of proof occurs in connection with this presumption. Its only practical effect is to make it unnecessary for the miner to

[41] Turner Elkhorn Brief 56-57.

[42] Title II of the Act establishes requirements for the sampling, reporting, and monitoring of respirable dust levels. During the period of time that records have been kept, the presumption contained in § 411 (c)(4) does not apply. See § 430.

[43] The operators cite the following definition of pneumoconiosis from Stedman's Medical Dictionary 1264 (21st Ed. 1966): "A fibrous induration of the lungs due to the irritation caused by the inhalation of dust incident to various occupations . . . ." Turner Elkhorn Brief 46 n. 21.

come forward with proof that his employment outside the coal mines, if any, did not involve exposure to pneumoconiosis-causing dust.

In contrast, the other two presumptions do shift the burden of proof. The shifts were necessary to prevent the miner or miner's widow from being disadvantaged by the very failures of industry and medical science for which the Act was intended to correct.

In providing benefits for widows as well as for living miners, Congress had to deal with a situation where past medical records, like past exposure records, were woefully inadequate. Hence, the presumption of § 411(c)(2) represents the congressional attempt to prevent miners' widows from being incurably prejudiced in their claims because medical death records for their husbands no longer exist or because their husbands were not attended by physicians knowledgeable about pneumoconiosis. As Congressman Flood eloquently observed in an impassioned floor speech:

> "The opponents say let them prove they have black lung, or if they are dead, let their widows prove they died of black lung.
>
> "They demand: Where is the evidence? Where are the hospital records? Where are the X-rays, huh? 'OK, prove it and we pay it.'
>
> "Dear God.
>
> "You should have seen those hospitals or the things that went by the name of hospitals, and the doctors who were on the company payrolls going around with a horse and buggy. What records? What evidence? Those doctors did not keep records even of the feed they gave to their horses, let alone the kind of records demanded by social security, and the experts today of evidence of what we had in the hard coal fields then

> called miner's asthma, or hard coal asthma, better called black lung today in both the hard and soft coal fields."[44]

The presumption thus operates to benefit a widow primarily in situations where medical records are scanty, inconclusive, or nonexistent. If there are complete medical death records, the medical evidence will either establish that pneumoconiosis was a substantial cause of death or establish that it was not. In short, without the presumption of § 411(c)(2) the irrational factor of whether or not complete medical records exist would be decisive in many widows' claims.

Similarly, the presumption of § 411(c)(4) is a fair and rational congressional attempt to establish eligibility criteria that take into consideration the limitations of current diagnostic techniques.[45] There is at present no practical method for positively determining whether or not a living miner is suffering from pneumoconiosis. The lung biopsy can prove the existence of pneumoconiosis, but it cannot prove nonexistence, since pneumoconiotic changes may be clustered in a part of the lung other than the part sampled. Furthermore, lung biopsy is far too drastic a technique to be used merely to determine eligibility for benefits; responsible physicians use this technique only when it is medically indicated. That leaves the X-ray. But, as witness after witness told congressional committees, the X-ray falls far short of being an objective means for determining the existence of pneumoconiosis or its degrees of advancement. In hearings prior to the enactment of the 1969 law and again prior to the 1972 amendments, numerous distinguished medical authorities testified that, in many miners, they found little relationship between X-ray findings and the degree of ad-

[44] 118 Cong. Rec. 16581 (1972).

[45] Although the district court upheld the presumption, it struck down the third sentence of § 411(c)(4), which establishes a standard of proof for rebutting the presumption. As the government explains, the court's holding was based on a misunderstanding of the operation of that sentence.

vancement of occupationally-related lung disease.[46] Moreover, federally-sponsored studies have demonstrated that highly trained physicians regularly and substantially disagree about whether an X-ray demonstrates pneumoconiosis and, if so, how much.[47]

Before reporting out the bill that became the Black Lung Benefits Act of 1972, the Senate Committee on Labor and Public Welfare conducted six days of hearings on proposed black lung legislation. The Committee's report is its own best testament that Congress acted rationally and based its proposals on information provided by credible medical and lay witnesses. For this reason the report is quoted at length:

> "Although title IV of the 1969 Act is couched in terms of pneumoconiosis, it has become glaringly apparent that the Act is not benefiting many of the nation's disabled coal miners who Congress intended to benefit. Testimony has indicated that miners with disabling breathing impairments who cannot be diagnosed medically as suffering from pneumoconiosis be-

[46] Testimony of D. L. Rasmussen, M.D., Harvey A. Wells, M.D., Lorin E. Kerr, M.D., Werner A. Lagueur, Hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, on S. 355, 91st Cong., 1st Sess., Pt. 2, 660, 664, 687, 693, 702. See also testimony of D. L. Rasmussen, M.D., Gordon Harper, M.D., Harry Lipscomb, M.D., John Rankin, M.D., Hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, on S. 2675, 92d Cong., 1st Sess., 115, 138, 151, 165.

[47] R. B. Reger and W. K. C. Morgan, *On The Factors Influencing Consistency in the Radiologic Diagnosis of Pneumoconiosis,* 102 Amer. Rev. of Respiratory Disease 905 (1970). In this study, the physicians disagreed in nearly 50 per cent of the films as to how much pneumoconiosis, if any, was present. See also Felson, et al., *Observations on The Results of Multiple Readings of Chest Films in Coal Miners' Pneumoconiosis,* 109 Radiology 19 (Oct. 1973); Reger, et al., *On The Diagnosis of Coalworker's Pneumoconiosis: Anglo-American Disharmony,* 108 Amer. Rev. of Respiratory Disease 1186 (1973); and W. K. C. Morgan, et al., *The Prevalence of Coal Workers' Pneumoconiosis in U.S. Coal Mines,* 27 Archives of Environmental Health 221 (Oct. 1973).

cause of the state of the art, are being denied benefits though they are as severely and often times more severely impaired than miners whose claims have been granted.

"The reasons for these denials are many. The great majority of denials are attributed to the inability of the miner to present X-ray evidence of the disease. Some have been denied because the simple breathing test, which measures only ventilatory capacity, may not adequately detect disabling respiratory or pulmonary impairment. . . .

* * * *

"Congress recognized when the Act was being considered, however, that the chest X-ray, or roentgenogram, was an imperfect means of ascertaining the existence of pneumoconiosis in coal miners. Testimony to that effect was provided by the Surgeon General, who produced a Public Health Service study showing the existence of pneumoconiosis from autopsies performed on deceased coal miners who had, while living, been diagnosed by means of X-ray examination to be free of pneumoconiosis. For this reason the Senate Committee report on the 1969 Act specifically referred to the need to require medical tests other than the X-ray to 'establish the extent and severity of the disease.' Many cases have come to the Committee's attention in which a miner is suffering from a severely disabling respiratory or pulmonary impairment, and yet he has no X-ray evidence of pneumoconiosis.

"Because of the continuing recognition of the fact that X-ray evidence is not always satisfactory, the Committee retained a provision of the House bill which prohibits the denial of a claim solely on the basis of the results of a chest roentgenogram. It was anticipated by Congress in 1969 that other tests to establish pneumoconiosis would be developed through research.

This has not been done, and the Social Security Administration continues to rely exclusively on the results of X-ray evidence.

"Testimony has further indicated that a negative X-ray is not proof positive of the absence of pneumoconiosis. Studies in addition to that of the Public Health Service confirm the existence of the disease by autopsy where a chest X-ray was negative, indicating an error of 25 per cent in diagnosis.

"In addition, many believe that coal miners have a greater than average incidence of respiratory and pulmonary impairments other than pneumoconiosis. Considerable testimony was devoted to this premise. Even in 1969 the Surgeon General had stated that 'medical researchers in both Britain and the United States have repeatedly shown that coal miners suffer from more respiratory impairment and respiratory disability than does the general population.'

"Similarly, noted pulmonary experts Drs. William S. Lainhart and Keith G. Morgan have stated that 'it is fairly well accepted that coal miners have a higher prevalence of lung disease than does the general male population,' and that 'Several respiratory diseases occur more frequently in miners.'

"Other testimony indicates that an X-ray may often be clouded by the presence of emphysema so that pneumoconiosis does not show on the X-ray. In some cases it has been alleged that the X-ray was of poor quality, and for that reason did not show the existence of black lung.

"Senator Robert C. Byrd, in testimony before the Subcommittee on Labor on the pending black lung benefits legislation, spoke eloquently of this urgent problem. He said:

'Let us stop quibbling with dying men as to whether their lungs are riddled with black lung or whether they are affected with asthma, or silicosis, or chronic bronchitis.'

"An acknowledged expert in the field of pulmonary impairments of coal workers, Dr. Donald Rasmussen, Director of the Cardio-Pulmonary Laboratory at the Appalachian Regional Hospital, Beckley, West Virginia testified as follows:

'The . . . assumption that coal workers' pneumoconiosis per se is the only disease process related to coal mining is not medically justified. Other conditions of the lung, in addition to pneumoconiosis, are commonly encountered among coal miners.

'While the exact causes of these conditions are not completely understood and while other non-occupational factors may be in part responsible, no medical authority can prove these conditions to be unassociated with the mining exposure.

'Current medical concepts include viewing the lung diseases associated with coal mining as a broad spectrum of disease conditions. Often these conditions coexist with either coal workers' pneumoconiosis or silicosis. Some are in reality, sequelae to pneumoconiosis per se.'

* * * *

"Representatives of the Department of Health, Education and Welfare who testified before the Committee this year asserted that there is no medical evidence to verify that coal miners as a class suffer from a greater incidence of respiratory or pulmonary impairment, other than pneumoconiosis, than the rest of the male population. However, they also testified that there is no medical evidence to rebut the previously

quoted testimony. That there is this apparent difference of view is unfortunate. For the miner and his survivors it is calamitous.

"For at least the past decade Congress has appropriated funds specifically for research into the diseases of coal miners. And yet, the Executive Branch of government does not have the answers.

"The Black Lung Benefits Act of 1972 is intended to be a remedial law—to improve upon the 1969 provisions so that the cases which should be compensated, will be compensated. In the absence of definitive medical conclusions there is a clear need to resolve doubts in favor of the disabled miner or his survivors.

"The Committee bill gives the benefit of the doubt to claimants by prohibiting denial of a claim solely on the basis of an X-ray, but providing a presumption of pneumoconiosis for miners with respiratory or pulmonary disability where they have worked 15 years or more in a coal mine, and by requiring the Social Security Administration to use tests other than the X-ray to establish the basis for a judgment that a miner is or is not totally disabled due to pneumoconiosis.

* * * *

"Sixty-two per cent of the denial of benefits issued by Social Security are based upon the claimant's failure to demonstrate the presence of coal workers' pneumoconiosis by X-ray evidence. In fact, there is strong evidence that emphysema may cloud an X-ray to such an extent that the X-ray shows no concentrations of coal dust, and is therefore read as negative. All medical witnesses before the Committee, save those of the Administration, urged less reliance on the X-ray.

"The publication 'Pneumoconiosis and Allied Occupational Chest Diseases,' issued by the British Ministry of Social Security, states that '. . . the disease (pneumoconiosis) is difficult to diagnose, especially in

the early stages, and accurate diagnosis depends on three essentials—a high quality full-size radiograph of the chest, a full clinical examination (including lung function tests) and complete industrial history.'

"Dr. Donald Rasmussen, a witness previously cited in this report, said this about sole reliance on the X-ray:

> 'No one is advocating that the X-ray not be employed, because the X-ray is a vital part of every medical evaluation, but the idea it can be used as a means of determining the presence of occupational lung disease is not tenable under the present state of knowledge, not only because all of the conditions which affect the miner may not be shown on the X-ray, the technical requirements of the X-ray are really too great, and the X-ray too unreliable, even for the purpose of detecting one entity, pneumoconiosis.'

"The bill reported to the Senate, H. R. 9212 as amended, establishes a rebuttable presumption that a totally disabled coal miner who worked in an underground mine for 15 years or a surface miner who was employed under environmental conditions similar to those experienced by underground miners, is totally disabled by pneumoconiosis if he has a totally disabling respiratory or pulmonary impairment, even if he has an X-ray which cannot be interpreted as positive for complicated pneumoconiosis. The Secretary of Health, Education and Welfare may rebut the presumption if (1) he establishes that the miner does not, or did not, have pneumoconiosis, or (2) that the miner's disability did not arise out of, or in connection with, his work in a coal mine. Lay evidence alone will not be sufficient to raise the presumption of pneumoconiosis.

* * * *

"The fifteen year period is not intended to be an inflexible standard serving as a bar to successful claims.

It merely reflects the testimony of the Surgeon General in 1969, who stated:

> 'For work periods less than 15 years underground, the occurrence of pneumoconiosis among miners appears to be spotty and showed no particular trend. For work periods greater than 15 years underground, there was a linear increase in the prevalance of the disease with years spent underground.' "[48]

III. SECTION 411(c)(3) IS A RATIONAL PROVISION, WHICH DOES NOT IN ANY WAY VIOLATE THE OPERATORS' RIGHT TO DUE PROCESS.

The government persuasively argues that Congress did not create a genuine presumption in § 411(c)(3), but rather used the phrase "irrebuttable presumption" as a form of legislative shorthand to accomplish the fully constitutional purpose of awarding benefits to all miners who suffer from the complicated stage of pneumoconiosis. The UMWA is in full accord with that analysis of the statute. Even assuming, however, that the district court could properly treat § 411(c)(3) as containing an irrebuttable presumption, the court erroneously held that provision unconstitutional.

A. Complicated pneumoconiosis is a devastating disease.

Complicated pneumoconiosis is an advanced form of coal workers' pneumoconiosis. It is identified during life by opacities on an X-ray of a miner's lung that are larger than one centimeter in diameter. After death it is diagnosed by autopsy when a pathologist finds massive lesions in the lung caused by the accumulation of coal dust. In general, the complicated stage of pneumoconiosis develops only after a

[48] H.R. Rep. No. 92-743, 92d Cong., 2d Sess., 843.

miner suffering from simple pneumoconiosis has had additional exposure to coal dust.[49]

Before enacting the Coal Mine Health and Safety Act, Congress heard testimony that medical opinion was substantially unified on the following matters:

1. Complicated pneumoconiosis afflicts only a small proportion of coal miners.

2. Complicated pneumoconiosis normally results in the total inability of a miner to engage in coal mine work.

3. Complicated pneumoconiosis is ordinarily progressive. It continues to get worse even if the miner has no further exposure to coal dust, although further exposure will hasten progression of the disease.

4. Miners who suffer from complicated pneumoconiosis have a significantly shorter life expectancy than other miners as a result of their lung disease.[50]

Medical opinion continues to be substantially unified on these matters.[51]

Based on this medical information, Congress enacted § 411 (c)(3), which provides that when X-ray, autopsy, biopsy, or other medical evidence demonstrates that a miner is or was suffering from complicated pneumoconiosis, "there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis." In practical effect this provision means that a miner with X-ray, autopsy, or biopsy

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[49] Statements of Werner A. Laqueur, M.D., Paul Gross, M.D., Ira Higgins, M.D., Leon Cander, M.D., Hearings on S. 355 *supra*, n. 46, Pt. 2, 695, 696, 760, 836-37, 857.

[50] Statements of Eugene A. Creany, Esq., Werner A. Laqueur, M.D., Wm. A. Stewart, M.D., Paul Gross, M.D., Ira Higgins, M.D., Leon Cander, M.D., Jethro Gough, M.D., Hearings on S. 355, *supra*, n. 46, Pt. 1, 502, Pt. 2, 696, 720, 759-60, 840, 843-44, 846, 855, 857-58, Pt. 3, 1029.

[51] *E.g.*, Morgan, *Respiratory Disease in Coal Miners*, 231 Journal of the American Medical Assn., at 1347 (March 31, 1975).

evidence of complicated pneumoconiosis may, without additional evidence, establish his eligibility for federal black lung benefits.

B. The district court misinterpreted § 402(f).

In holding that § 411(c)(3) is a constitutionally invalid irrebuttable presumption, the district court gave an unwarrantably restrictive meaning to the work-test definition of "total disability" contained in § 402(f). By erroneously reading that section to mean that *only* miners prevented by pneumoconiosis from engaging in gainful employment should be considered totally disabled, the court was able to conclude that § 411(c)(3) improperly departed from the statutory definition of disability.

The district court's restrictive construction of § 402(f) ignores the legislative history and the context in which the work-test language was added to the Act. Section 411(c)(3), providing benefits to all miners who suffer from complicated pneumoconiosis, was part of the Act as originally passed in 1969. Lengthy hearings were held in 1971 and 1972 because of increasing dissatisfaction in the coalfields with the Social Security Administration's restrictive implementation of the program. At those hearings attention focused on the unduly narrow regulations and rules of thumb adopted by Social Security to determine whether a miner was totally disabled by pneumoconiosis. There were no complaints about the implementation of § 411(c)(3). No one testified that miners suffering from complicated pneumoconiosis ought not to qualify for benefits. Rather, the dissatisfaction was with Social Security's mechanical disability criteria requiring X-ray proof of pneumoconiosis in all cases and adopting the definition of "total disability" contained in § 223(d) of the Social Security Act.[52] Congressman Burton

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[52] Section 223(d), 42 U.S.C. § 423(d), defines "disability" as "inability to engage in any substantial gainful activity."

forcefully expressed that dissatisfaction during the 1971 House Hearings:

> "One final point that occurs to me because it is also important. I think there is some misunderstanding at the executive level of the Social Security Administration. It is obviously very possible for a person to be totally disabled and still working. I am reminded of a woman who could do little more than move her chin about a quarter of an inch, a paraplegic, who was disabled but ineligible for benefits under our state public assistance laws because she was a telephone operator. So the finding of disability is not precluded by the mere fact that you happen, by some inordinate dint of effort or will, to be putting in a substantially full work week. . . . We did not view the fact that you were working as any evidence, per se, that you didn't come within the total disability parameters. It is a subtlety, but it is really quite important."[53]

Senator Randolph, who chaired the 1971 and 1972 Senate hearings, developed these thoughts in his opening statement:

> "H.R. 9212 is a worthy measure which makes significant changes in the black lung program. . . .
>
> "I do not believe, however, that it will alleviate the most critical problems faced by our disabled miners and survivors of deceased miners. . . . The House bill does not reach the large group of miners who suffer from pulmonary or respiratory impairments which, though not diagnosed as complicated pneumoconiosis are equally, if not more, disabling. The inclusion of pulmonary or respiratory impairments in my bill is an effort to establish a system under which these persons can receive fair and equitable consideration.

[53] Hearings before the House Committee on Education and Labor, on H.R. 9212, 92d Cong., 1st Sess., 107.

> "Coupled with this provision in my bill is a broader definition of disability. . . . The expanded definition of disability, in my opinion, will be essential if any substantial improvements to the black lung program are to be realized.
>
> "The point has been made time and again that a coal miner should be considered totally disabled when he can no longer work in the coal mines. Support of this proposition—and we will hear extensive testimony on this—rests in the uniqueness of employment circumstances in coal mining areas, the unavailability of other employment, and the lack of training for miners to pursue other gainful employment."[54]

The report of the Senate Committee on Labor and Public Welfare, which added the language of § 402(f) to H.R. 9212, makes clear that the committee's intent was to broaden the existing interpretation of "total disability" and not to narrow it in any way.[55]

Had the district court heeded the context in which § 402(f) was enacted, it would have realized that the amendment was intended to require the Social Security Administration to adopt regulations in addition to the already existing medical criteria in order to assure that miners who were in fact prevented by pneumoconiosis from performing coal mine work would be among those eligible for benefits. In failing to adopt this interpretation the district court ignored the legislative history as well as its obligation to resolve doubts about a statute's interpretation in favor of constitutionality.

Furthermore, in holding that § 411(c)(3) is a departure from the definition of total disability contained in § 402(f), the district court also gave an unduly restrictive definition to the word "prevents." In effect the court held § 411(c)(3) unconstitutional because it forecloses inquiry into

[54] Hearings on S. 2675, *supra*, n. 46, at 3.
[55] S. Rep. No. 92-743, 92d Cong., 2d Sess., 16-17.

whether a miner with complicated pneumoconiosis is actually prevented from performing his usual coal mine work.

A layman's acquaintance with modern medical concepts is enough to know that the word "prevent" in this context is subject to variable interpretation, depending upon a variety of economic, social, psychological, and medical factors. For example, if "prevent" means merely that the miner lacks physical energy or muscular capacity to turn on and run the levers of a cutting machine or a shuttle car, then most heart attack victims and most tuberculosis patients would not be "prevented" from doing coal mine work. But they would undoubtedly be "prevented" by the plaintiff coal operators as well as their physicians from performing coal mine work —not because they could not make it through a shift but because the likelihood that they would seriously aggravate their condition is so high that their work activity would pose a danger to themselves and to their fellow employees. Similarly, a person who breathes abnormal amounts of carbon monoxide is able to keep on breathing it even after he gets sick—until he dies from it. A miner suffering from complicated pneumoconiosis may be able to continue performing his job in the coal mines and to continue breathing coal dust—but if he does, he will die from it.

Preventive health is just what it says in this context. One of the primary remedial purposes of Title IV of the Act was to apply modern medical understanding of the cause of coal workers' pneumoconiosis to make it unnecessary for miners to work themselves to the point of utter helplessness and death. A miner with complicated pneumoconiosis would be *prevented* by virtually any knowledgeable physician from performing his usual coal mine work—not necessarily because he could not meet his work quota, but because additional exposure to coal dust is so likely to kill him. Even without continued exposure, his lung disease is likely to progress and to cause premature death. But it is medically incontestable that continued exposure to coal dust will hasten

the process and make his condition all the more certainly deadly. Consequently, it is entirely rational and consistent with the purposes of the Act to provide benefits to any miner suffering from complicated pneumoconiosis.[56]

C. Judged by the guidelines set forth in *Salfi* v. *Weinberger*, § 411(c)(3) is clearly not an unconstitutional presumption.

The district court based its holding that § 411(c)(3) is an unconstitutional irrebuttable presumption on the prior decisions of this Court in *Stanley* v. *Illinois*, 405 U.S. 645 (1973), and *Vlandis* v. *Kline*, 412 U.S. 441 (1973).[57] Subsequent to the district court's ruling and subsequent to the noting of probable jurisdiction in this case, this Court explained and limited its previous decisions on irrebuttable presumptions in *Salfi* v. *Weinberger*, —— U.S. ——, 43 U.S.L.W. 4985 (1975).

Salfi is a clear departure from the Court's previous recent decisions on irrebuttable presumptions.[58] It lays the substan-

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[56] There is no inconsistency in the circumstance that a miner who suffers from complicated pneumoconiosis can qualify for benefits while still employed in the mines. That is not *per se* an encouragement to continue working, but rather a means for the miner to stop working. Under the present system, with delays of one to two years in the processing of claims and a 78.4 per cent denial rate, many miners now feel they cannot afford first to stop work and later to find out whether they are eligible for benefits. A miner who is already assured of his entitlement to benefits is far more likely to heed medical advice that he leave the mines.

[57] The court also cited a discredited economic due process case from the 1930's, *Heiner* v. *Donnan*, 285 U.S. 312 (1932).

[58] While not explicitly an "irrebuttable presumption" case, *Marshall* v. *United States*, 414 U.S. 417 (1974), prefigured the *Salfi* decision. In *Marshall*, the Court upheld against due process attack a provision of the Narcotic Addict Rehabilitation Act of 1966 that excluded all persons with two or more convictions from the opportunity for civil commitment. The Court said, "When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, *arguendo*, that judges with more direct exposure to the problem might make wiser choices." *Id.* at 427.

tive due process doctrine back in its historical resting place and reaffirms the "rational relationship" test as appropriate for evaluating congressional enactments in the area of social welfare legislation. It returns to the standard of *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960), that "the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Salfi* also refers to *Richardson* v. *Belcher*, 404 U.S. 78, 84 (1971), where the Court said that a congressional enactment does not violate the Due Process "[i]f the goals sought are legitimate, and the classification is rationally related to the achievement of those goals . . . ."

Judged by the criteria set forth in *Salfi*, the irrebuttable presumption in § 411(c)(3) is unquestionably constitutional. There is a sound rational basis for the classification.[59] The classification involves no invidious discrimination. It does not prejudice any fundamental right of the coal operators.[60] That coal operators rather than the federal government must pay the benefits is no ground for applying a different constitutional standard.[61] Nor is a different standard

[59] Namely, that Congress heard testimony and was aware of widely held medical opinion that complicated pneumoconiosis is an advanced stage of pneumoconiosis that usually leads to disability and premature death. See Part III A, *supra*.

[60] In *Salfi* the Court distinguished *Stanley* v. *Illinois*, 405 U.S. 645 (1973), and *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632 (1974), by classifying the rights at stake (the rights to conceive and bear one's children and the right to personal choice in matters of marriage and family life) as fundamental rights entitled to special constitutional protection. By contrast, said the Court, "a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status . . . ." *Salfi*, 43 U.S.L.W. at 4992.

[61] In *Salfi*, 43 U.S.L.W. at 4992, the Court referred to the long line of cases holding that the Fifth and Fourteenth Amendments require no closer judicial scrutiny of laws and regulations affecting private business than that necessary to assure that there is a rational relationship to the underlying policy objectives and no invidious discrimination. See also *Marshall* v. *United States*, 414 U.S. 417, 433 (1974) (Marshall, J., dissenting).

called for because the potential payor rather than the payee has attacked the classification.

No prior decision of this Court suggests that there is any constitutional reason why Congress cannot require a coal operator to pay compensation benefits to a miner whose health has been impaired to the extent of developing complicated pneumoconiosis as the result of his coal mine employment. *Salfi* plainly mandates that Congress can do so. Section 411(c)(3) is a rational and humane provision, which this Court should restore to full operation at an early date.

CONCLUSION

For the foregoing reasons, the judgment of the district court on appeal in No. 74-1316 should be affirmed, and the judgment of the district court on appeal in No. 74-1302 should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

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Consolidated

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Defendants-Appellants,

vs.

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Plaintiffs-Appellees.

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vs.

JOHN T. DUNLOP, Secretary of the United States Department of Labor, et al.,
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Appeals from the United States District Court
for the Eastern District of Kentucky

REPLY BRIEF OF
TURNER ELKHORN MINING COMPANY, et al.

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REPLY BRIEF OF TURNER ELKHORN MINING COMPANY, et al.

STATEMENT

1. The questions raised by these appeals center on the rationality, in the constitutional sense, of federal legislation requiring coal mine employers to pay benefits to former and present employees for physical disability caused by a single occupational disease known as coal workers' pneumoconiosis. A clear understanding of what is known—and not known—about that disease is essential to an understanding of many of the issues before this Court. The brief filed herein by the federal parties

is so seriously inaccurate in this regard that it threatens to obscure those issues. The government's brief conveys the misleading impression that pneumoconiosis may develop in a coal miner long after his exposure to coal dust has ceased, and that it will inexorably progress in its development until the miner is totally physically disabled. (See Fed. Br. pp. 5, 10, 23). The legislative history of the law reveals an overwhelming consensus of medical evidence to the contrary. According to this evidence, if a miner does not have pneumoconiosis at the time his exposure to coal dust ceases[1] he will not develop it; even if he does have it to a degree that initially is diagnosable by x-ray, it won't progress to a disabling stage after exposure ceases.[2] A miner's pneumoconiosis will progress to the disabling complicated phase (Progressive Massive Fibrosis) only if he has the simple form to an advanced degree at the time his exposure to dust ceases. Pneumoconiosis reaches the stage at which it may be progressive in the absence of coal dust only after many years of exposure, and by that time it clearly is diagnosable by x-ray.[3]

[1] Or, if the concentrations of dust to which he is exposed are reduced below a harmful level. That is why Congress has placed such emphasis in the Act on reducing dust levels in mines, and provided for transfer of susceptible miners to less dusty work environments within mines. See plaintiffs' Principal Brief pp. 56-57 (hereinafter, "Pl. Br.").

[2] See discussion and authorities cited at Pl. Br. pp. 46-48; 50-53. See also: Hearings on S. 355, S. 467, *et al.* (Coal Mine Health and Safety Act) before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess., Part 2, pp. 836-37 (1969); Hearings on H.R. 7, 8, 3333 (Black Lung Benefits Reform Act of 1975) before the Subcommittee on Labor Standards of the House Committee on Education and Labor, 94th Cong., 1st Sess., p. 165 (1975); Morgan, *Respiratory Disease in Coal Miners*, J. Am. Med. Ass'n 1347-48 (March 31, 1975).

[3] See Pl. Br. p. 47; 1969 Senate Hearings, note 2, *supra*, at 837; Morgan, note 2, *supra*, at 1347.

The government also asserts in its brief that there are many other types of respiratory ailments caused by exposure to coal dust, and the brief implies that the Act covers them. (Fed. Br. pp. 19, 21, 37). Legislative history, however, leaves no doubt that Congress intended that compensation only be paid for disability caused by coal workers' pneumoconiosis. In 1971, it was proposed that the law be amended to cover disability from any respiratory or pulmonary disease or impairments, and their sequelae, arising out of employment in a coal mine. Congress, however, was aware that mine workers, along with some 25% of the adult males in the general population of the nation, were likely to suffer from, and be disabled by, non-work-related pulmonary diseases such as chronic bronchitis and emphysema; and there was substantial evidence before it showing it to be the overwhelming consensus of expert medical opinion that coal workers' pneumoconiosis was the only respirable disease for which there was an established occupational relationship.[4] The proposal to broaden the law was not enacted.

The description of the nature and effect of pneumoconiosis upon coal miners which the government advances in its brief appears to be designed to disguise the patently overinclusiveness of the legislation in question—the fact that miners who have not been exposed to coal dust for decades may qualify for benefits under the law, and the fact that the diagnostic standards mandated by the law encompass nonwork-related respirable diseases. The views expressed in the government's brief are flatly contrary to the views that

[4] Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, 92nd Cong., 1st & 3rd Sess., Hearings on S. 2675, S. 2289, H.R. 9212, 1-21, 375-85, 409, 442-50, 465-68, 552.

the Departments of HEW and Labor, relying on the vast medical resources to which they have access, consistently expressed during congressional deliberations on this legislation.[5]

2. The government's brief also inaccurately portrays what has come to be referred to in these cases as the "retroactive" operation of the Black Lung Benefits law. The claims of former miners for which mine operators may be held liable are not limited to cases where disability due to pneumoconiosis has developed subsequent to the effective date of the Act, as the government would have this Court believe. (See Fed. Br. pp. 16, 27). The Act requires that claims be filed within three years of *discovery* of total disability due to the disease, or within three years of death due to it. Section 422 (f)(1); 30 USC 932 (f)(1). Since, as the government appears to concede, the Act expands the definition of coal workers' pneumoconiosis and disability beyond the conventional and scientific understanding of those terms (See Fed. Br. pp. 39-44), "discovery" that a miner is disabled by the disease *as defined in the Act* could only occur after passage of the Act, and through application of its diagnostic parameters, even though his physical condition may have been the same for many years.

The great numbers of former miners who have been found eligible for benefits even though they have not been exposed to coal dust for years or decades is not a medical phenomenon—it is a legislative phenomenon. Congress has, by legislative *fiat*, invented a disease unknown to medicine, given it the name of a true, medically recognized, disease and defined it as disabling in circumstances where it is not disabling. Congress achieved

[5] See discussion at Pl. Br. pp. 50-53, 58. See also: 1975 House Hearings, note 2, *supra*, at 127, 135.

this end through the use of arbitrary definitions and presumptions that have no valid foundation in medicine, and that compel diagnosis of occupational disease and disability where it does not exist in reality. If, prior to passage of the law, these cases had been presented to medical experts unfettered by such artificial definitions and presumptions, they would not have been so diagnosed, just as they would not be so diagnosed today if viewed outside the context of an application for benefits under the Act.

3. For the reasons explained at greater length in plaintiffs' Motion to Affirm in No. 74-1302 (pp. 8-10), this Court's summary affirmance of the decision of the District Court for the District of Columbia in *National Independent Coal Operators Association v. Brennan*, 372 F. Supp. 16 (hereafter, "the NICOA case"), does not foreclose consideration of the issues in these cases, as the government suggests (Fed. Br. pp. 11-12). The government's assertion that the NICOA case involved a challenge to substantially all the provisions of Title IV, and its assertion that the District Court upheld the constitutionality of the Act, misrepresent the nature of that case, its holdings, and its precedential value. The "opinion" of the District Court in the NICOA case consists merely of bare findings of fact and conclusions of law, unilluminated by a reasoned elaboration of the grounds of decision or citation of authority. The NICOA Court's statement that "Congress had the constitutional power to enact Title IV of the Act", is merely a jurisdictional finding preliminary to the Court's findings on the merits. 372 F.Supp. at 23. A holding that Congress had the constitutional *power* to enact the legislation in question says nothing of the crucial issue in the present cases, which is whether Congress has used that power in a way consistent with the Constitution.

The government's contention that the NICOA decision is a meaningful precedent upon which the issues in these cases may be resolved, is technical fiction, and the Court should not be misled by it. Plaintiffs submit that this Court, in its discretion, should consider its summary affirmance of the NICOA case as having little precedential value in the circumstances of the instant cases. See the majority opinion in *Fusari v. Steinberg*, 419 U.S. 379, 388 n. 15, and the concurring opinion of Burger, C.J., 419 U.S. at 390-92 (1975); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

ARGUMENT

I.

Plaintiffs' contention that Congress has chosen a manifestly, and unconstitutionally, irrational means for supplying relief to financially distressed former miners cannot be dismissed by simply invoking the counsels of extraordinary judicial deference to legislative judgment expressed in *Williamson v. Lee Optical Co.*,[6] and decisions of like import. As plaintiffs have demonstrated at length in their principal brief, the use of workmen's compensation mechanisms to impose liability on the former employers of individual claimants will have an arbitrarily discriminatory impact upon coal mine operators that cannot be rationalized, much less justified, by *any* characterization of the law's purpose (See Pl. Br. pp. 34-44). To agree with the government's argument that the means Congress has chosen in this instance to accomplish its ends must be accepted as entirely rational (Fed. Br. pp. 33-34) would require this Court to refrain entirely from scrutinizing the constitutionality of this legislation. The decisions of this Court cited and discussed at pages 31-32 of plaintiffs' principal brief strongly suggest that no legislation should enjoy the immunity from judicial scrutiny urged by the government here. The backward-looking nature of the liability imposed on mine operators by this legislation renders it suspect as having great potential for unfairness, and, consequently, it should be subjected to strict scrutiny.

[6] 348 U.S. 483, 488.

Neither may the "retrospective" aspects of this legislation be rationalized by reference to "settled principles of tort law", as the government maintains at pages 28-29 of its brief. The Act does not impose liability upon mine operators on the basis of rules sounding in tort, and there is nothing in the Act to suggest that Congress intended to do that. The law is framed as a workmen's compensation law—but with one critical, and constitutionally significant difference: the compensation costs imposed by this law cannot be reflected in the price of the product whose production gave rise to the liability. It is not unusual for a compensation law to impose liability for occupational disease which develops within a given time after the employment relationship has terminated, *if that potential legal liability existed during the employment relationship and therefore could be anticipated by the employer.* If an employer is aware of such potential liability he can make provisions for insuring against it and reflecting its cost in his pricing, just as he can in the case of any other potential liability. Plaintiffs, however, know of no employer-financed workmen's compensation law that affords coverage to persons who had ceased to be workmen prior to enactment of the law, and apparently the government doesn't either.

Congress failed to recognize the essential, and limited, social function of workmen's compensation laws, which is to shift the cost of work-related disability from the employee to the employer—who is capable of reflecting it in his pricing as a cost of the production that gave rise to the disability. (See Pl. Br. pp. 35-39). The benefits provided in the Act for former mine workers are not actually workmen's compensation benefits. Accurately described, they are payments in the nature of restitution

for the unavailability of workmen's compensation benefits in the past. (See legislative history discussed at Pl. Br. pp. 7-14, 34, 40-41).

II.

A. The compensation provisions of the Coal Mine Health and Safety Act were enacted for the express purpose of providing benefits to mine workers who are totally disabled by a single occupational disease. The government concedes that under this legislation mine operators may be required to pay compensation to claimants whose diseases are not work-related and to claimants who actually are not totally disabled by any disease. (Fed. Br. pp. 39, 43, 46-47).

The government maintains, however, that mine operators' constitutional rights are not implicated by the overinclusive features of the law because Congress "could have" enacted legislation requiring mine operators to pay benefits to persons suffering from respiratory diseases other than coal workers' pneumoconiosis, or to persons who are not totally disabled by the disease. (Fed. Br. pp. 43, 47, 50). The fact remains that Congress did not, or at least did not purport to, do so in the instant legislation.

Benefits are not payable under the law for disability arising from other respirable diseases, or from what might be considered sequelae of coal workers' pneumoconiosis. Congress did not intend to compensate certain claimants regardless of their present ability to work. Under the law as originally enacted, a mine worker was considered totally disabled if he was unable, by reason of pneumoconiosis, to engage in any substantial gainful activity. In 1972, over the defendants' objections, Congress broadened the definition of "total dis-

ability" to cover claimants who, because of the disease, cannot or could not find comparable work suitable to their skills and abilities. Congress did not, however, abandon the requirement that physical disability caused by the disease must be shown in order to qualify for benefits. The amended definition of "total disability" provides that:

> ". . . a miner shall be considered totally disabled when *pneumoconiosis prevents him* from engaging in gainful employment requiring skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time. Act, § 402(d), 30 USC § 902(d). (Emphasis supplied)

The arbitrary and overinclusive nature of the means by which Congress has attempted to achieve its purposes in this legislation cannot be justified by conjecture concerning what other purposes Congress legitimately might have written it to achieve. To uphold this law on the basis that Congress *could have* enacted it for different purposes would require this Court to assume the role of legislator and decide that Congress *would have* done so.

B. Plaintiffs contend that in this legislation Congress has erected period-of-employment presumptions governing eligibility determinations that arbitrarily imbue cases of nonoccupational disease and disability with presumptive merit, and has so hedged the claims determination process with medically invalid diagnostic limitations that those presumptions are effectively irrebutable. Plaintiffs believe that there is ample evidence in the legislative history of the law to demonstrate that there is no rational connection between the facts Congress has decreed shall be presumed, and the facts which must be proved to trigger those presumptions. If legislative history does not settle the

question, Plaintiffs believe they can present evidence to prove the irrationality of the presumptions.

This Court has recognized that the Constitution forbids the enactment of statutes that permit or compel inference of a fact from proof of another when there is no rational connection between the fact proved and the ultimate fact to be presumed therefrom, or that do not afford a fair opportunity to rebut such presumptions even where a rational connection may exist. See decisions cited at pages 60-61 of plaintiffs' principal brief; see also: *Turner v. Dep't. of Employment Security*, . . . U.S. . . ., No. 74-312, decided November 17, 1975. Determination of whether a statute does contain this vice necessarily must involve a factual inquiry of some sort. If the rule were otherwise, legislatures could decree with impunity that *any* fact could be inferred from proof of *any* other fact.

The government argues in defense of the legislative presumptions in question here, that Congress had only two alternatives: either to enact presumptions that would be overinclusive in operation, or to deprive worthy claimants of benefits. (Fed. Br. pp. 21, 39). The government maintains that the factual rationality of the presumptions is not a proper matter for judicial scrutiny; that it is sufficient that the legislative history shows there was some dispute concerning the causes and disabling effect of pneumoconiosis.

Plaintiffs submit that Congress had a third alternative. Even if it could be conclusively demonstrated that it was beyond the capabilities of medical science to identify which respiratory diseases were and which were not caused by exposure to coal dust, and what disabling effects those diseases might or might not have, it does not follow that Congress should be given a license

to legislate those facts into existence. The rational legislative alternative is to identify more clearly the purposes wished to be achieved by the law. If it was Congress' intention to compensate all coal mine workers disabled by occupational pneumoconiosis, *and* all coal mine workers disabled by nonwork-related respiratory diseases A, B, C and D, then it would have been a simple matter for Congress to have written a law saying that, and to have selected rational means for achieving that end. Plaintiffs submit that it is not beyond the competence of this Court to require Congress to proceed in that fashion in this case.

C. The government strenuously argues that this Court's recent decision in *Weinberger v. Salfi*, . . . U.S. . . ., 95 S.Ct. 2457 settles most of the issues in the instant case. That is far from true. The issues raised by plaintiffs' challenge to the legislative presumptions included in the benefits provisions of the Coal Mine Health and Safety Act differ entirely from those considered by the Court in the *Salfi* case.

Unlike *Salfi*, this case does not involve the difficult conceptual problem of determining whether statutory language ostensibly classificatory in nature actually embodies a prohibited evidentiary presumption. The statutory provisions objected to here erect explicit, unvarnished evidentiary presumptions.

The *Salfi* case involved a noncontractual claim to receive funds from the public treasury which enjoyed no constitutional protection. The instant case involves legislation affecting the rights of private parties. It imposes burdens on mine operators for the benefit of mine workers—burdens which plaintiffs contend violate their constitutional rights.

This case, unlike *Salfi*, does not involve a "prophylactic rule" designed to screen out fraudulent claims, or limit the demands on limited public resources.

Finally, and perhaps most important, this case, unlike *Salfi*, does not involve presumptions designed to foster administrative convenience or eliminate cumbersome, expensive and time-consuming individualized determinations of eligibility for benefits. Under the legislation in question here, claims for benefits *are* processed on an individual basis, and individualized determinations of eligibility *are* required. To plaintiffs' knowledge, the Department of Labor requires the same documentation of employment history, medical examinations, and other relevant information, of all claimants whether or not their claims are governed by the presumptions. The presumptions do not eliminate individualized determinations, they merely influence, or dictate, the result that will be reached in those cases where they are applicable.

In short, the instant case involves none of the considerations which compelled this Court to the decision it reached in the *Salfi* case.

CONCLUSION

For the reasons stated herein, the judgment of the district court appealed from in Case No. 74-1302 should be affirmed; the judgment of the district court appealed from in Case No. 74-1316 should be reversed with directions to enter judgment for the plaintiffs for the relief

demanded in their complaint; in the alternative, the judgment appealed from in Case No. 74-1316 should be vacated and the cause remanded for trial.

Respectfully submitted,

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